Australia and the Negotiations of the International Bill of Rights (1946-1966)

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This thesis is my own work and all
sources have been acknowledged.
It has not been submitted for another degree

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ABSTRACT

This thesis examines Australia's policies towards the development of the International Bill of Rights (1946-1966). It considers Australia's approach both to the substance of human rights guarantees and to the modes of international and domestic implementation for such rights. Prevailing impressionistic accounts have assumed either that Australia consistently supported a commonly understood set of human rights standards, or voiced reservations motivated by Cold War ideologically related concerns. The picture that emerges from this thesis is of a more complex relationship between decision makers' pre-existing philosophies, domestic pressures and policy. The dominant pattern noted is Australia's progressive movement away from many of the tenets of the modern 'human rights lexicon'. Under the leadership of Dr HV Evatt, Australia gave strong support to the equal recognition of all forms of rights and envisaged extensive forms of State and international implementation. When Liberal Ministers for External Affairs, PC Spender and RG Casey gained power, and as policy making power was devolved to the bureaucratic level, Australia moved towards triumphing 'civil liberties' as archetypal human rights. Support was forthcoming for only limited State and international society involvement. A sub-text throughout the negotiations were Australia's efforts to accommodate sensitive domestic policies concerning, migrants, Aboriginal persons and indigenous inhabitants of Australia's external territories and women. Although Australia has since ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, by highlighting the deep-seated philosophical differences concerning the scope of human rights, this thesis points to the likelihood of such variations continuing to influence the perceived implications of Australia's international human rights obligations.

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INTRODUCTION

On 10 December 1948, Dr HV Evatt, then Australian Minister of External Affairs and President of the United Nations' General Assembly, presided over the General Assembly's adoption of the *Universal Declaration of Human Rights* (UDHR).[1] As the cameras of the international media rolled, Dr Evatt spoke dramatically of the importance of the UDHR as a 'step forward in a great evolutionary process':

> It was the first occasion on which the organised community of nations had made a declaration of human rights and fundamental freedoms. That document was backed by the authority of the body of opinion of the United Nations as a whole and millions of people, men, women and children all over the world, would turn to it for help, guidance and inspiration.[2]

With its tone of triumphalism and idealism, Dr Evatt's statement has been adopted by Australian human rights lawyers as Australia's 'first step in the [human rights] journey'.[3] Yet, the picture we have of this journey is far from complete. Despite having attracted the interest of contemporary Australian academics,[4] the details of Australia's legal policies during the negotiations of the International Bill of Rights (1946-1966)[5] have become obscured by the passage of time and academic neglect. This thesis seeks to reclaim this early period of Australia's human rights policy. By highlighting the complexities and divergences within the rich tapestry of Australia's formative human rights policy, it draws attention to the ongoing need to consider the role of subjective, contextualised features in critiquing Australia's implementation of human rights standards.

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1 Universal Declaration of Human Rights, adopted by GA Resolution 217A(III), 10 December 1948, 3(1) UN GAOR, UN Doc A/811, 71.

2 UN GAOR, 183rd Plenary Meeting, 10 December 1948, 934, as quoted in N Harper, D Sissons, *Australia and the United Nations*, Manhattan Publishing Company, New York, 1959, 255. The statement is also quoted (though with varied tenses) in a Department of External Affairs ('DEA') internal memorandum entitled 'International Instruments on Human Rights', circa 1952, in NAA A 1838/1, Item 856/13 Pt 11.

3 N O'Neill, 'A Never Ending Journey? A History of Human Rights in Australia' in Redfern Legal Centre (ed), *Human Rights: the Australian Debate*, Redfern Legal Centre Publishing, Sydney, 1987, 7.

4 See G Sawer, 'The United Nations' in G Greenwood and N Harper (eds), *Australia in World Affairs, 1950-1955*, Cheshire, Melbourne, 1957 and his subsequent entries in the volumes covering 1955-1960, and 1960-1965. See too N Harper, D Sissons, *op cit.*

5 The International Bill of Rights is the term commonly used to describe the UDHR, ICCPR and ICESCR. A copy of each instrument can be found in Appendix 2. As discussed below, Australia participated in all stages of the international negotiation of the International Bill of Rights.

With few exceptions, texts dealing with Australia and human rights focus upon Australia's relationship with international human rights following its ratification of the twin human rights Covenants, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[6] and the *International Covenant on Civil and Political Rights* (ICCPR)[7] in 1976 and 1980 respectively.[8] Scholars quote provisions of the international instruments, advance their understandings of the objective meanings of the provisions of such instruments and evaluate Australia's behaviour accordingly. In exploring the interpretation of clauses, the general drafting history of the clauses may be considered together with the jurisprudence emanating from international human rights bodies and other commentators. Whether Australia supported an individual clause as drafted or evinced a particular understanding of the clauses is not noted. This author is no exception.[9]

Even where historical references are inserted into the 'background' section of contemporary analyses, the references are brief and impressionistic. Most take the form of variants on two themes, both of which serve to reinforce a narrative of Australia's 'natural', inevitable acceptance of universal human rights standards.

The first historical theme, one that features prominently in official statements, is that of Australia's continuous, bipartisan support for international human rights. On the occasion of the 50th Anniversary of the UDHR in 1998, for instance, the Department of Foreign Affairs and Trade produced a fact sheet outlining Australia's relationship with international human rights. It cited Australia's foundational work with the United

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6 International Covenant on Economic, Social and Cultural Rights, opened for signature on 16 December 1966, entered into force generally 23 March 1976, ATS 1976 No 5.

7 International Covenant on Civil and Political Rights, opened for signature on 16 December 1966, entered into force generally 3 March 1976, ATS 1980 No 23.

8 Peter Bailey has dealt with the period before ratification in tracing the Commonwealth's lack of legislative power to enforce human rights: P Bailey, *Human Rights: Australia in an International Context*, Butterworths, Sydney, 1990, Chapter 5. For examples of the more common ratification starting point: see the studies in D Kinley (ed), *Human Rights in Australian Law*, Federation Press, Sydney, 1998; R Piotrowicz, S Kaye, *Human Rights in International and Australian Law*, Butterworths, Sydney, 2000.

9 See A Devereux, 'Australia and the Right to Adequate Housing' (1991) 20 *Federal Law Review* 223.

Nations Commission on Human Rights as evidence for the Australian government's longstanding commitment to human rights.[10] Similarly, Dr Stuart Harris, as Secretary of the Department of Foreign Affairs and Trade in 1987 emphasised the bipartisan nature of the Australian government's support for international human rights.[11] Each year on International Human Rights Day, Australian politicians join in support for a Resolution lauding the anniversary of the UDHR and affirm their ongoing support for human rights.[12] This 'heritage' view of Australia's engagement with international human rights has been fostered by academics' invocation of Evatt's involvement in the UDHR as the major 'pre-ratification' historical event of significance in Australia's international human rights past. Such references have served to entrench an image that current Australian governments are carrying on an unbroken tradition of support for human rights principles.

The second historical narrative is of more general application. It concerns the role of the Cold War in the negotiations of the International Bill of Rights. In many international human rights texts used in Australia, the Cold War is depicted as having prolonged negotiations and interrupted or limited Western States' enthusiasm for economic and social rights.[13] Australia is implicitly classed as a Western State whose fear of communism led it to resist the equal recognition of economic and social rights. Within Australian literature, the Cold War has been used to explain Australia's selective enthusiasm for United Nations intervention in cases of alleged human rights violations.[14] While the Cold War theory hints at some level of change within Australian international human rights policy, by casting responsibility for this change on an

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10 'Australia and Universal Human Rights', Department of Foreign Affairs and Trade Fact Sheet No 26, July 1998, 2.

11 S Harris, 'Australia's Foreign Policy and Human Rights' (1987) 58 *Australian Foreign Affairs Record* 569, 569.

12 See for instance the bipartisan support given to the Resolution moved by the Prime Minister, J Howard, on the occasion of the 50th Anniversary of the UDHR: Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 10 December 1998, 225.

13 See for instance MCR Craven, *The International Covenant on Economic, Social and Cultural Rights*, Clarendon Press, Oxford, 1995, 8-9; M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, Strasbourg, 1993, xx. Whilst these texts do not deal specifically with Australia's engagement with international human rights, they are both texts used by Australian practitioners and students and thus inform their understandings.

14 G Sawer, 'The United Nations' (1950-1955), *op cit*, 94.

external event, the Cold War theory also minimises the significance of the change. It implies that had not the Cold War occurred, Australia's support for the totality of the human rights regime may well have been complete and encourages the tantalising prospect that with the subsiding of East-West tensions, Australia's 'natural' support for the equal recognition and enforcement of all human rights might return.

Both the total neglect of Australia's history and the two styles of generalised references to Australia's history identified above reinforce the belief that Australia's act of ratifying the ICCPR and the ICESCR constituted acts of accepting human rights obligations whose meaning was (and remains) commonly understood by the Australian State and commentators alike. No attention is given to what obligations Australia considered itself as accepting. Neither is there any perceived need to consider whether Australia shared the philosophical outlooks towards human rights of other participants in the process or that of current commentators. Through their lack of attention to such detail, the impression is given that either Australia's stance was unremarkably identical to others or that any 'aberrant' or non-conformist position was surrendered as of the date of accepting such commonly understood standards. Ultimately, this historiography serves to dissuade scholars from further investigation of Australia's historical human rights by perpetuating the impression that Australia's previous policies have little to offer 'post-ratification' practitioners.

Australian international human rights literature is by no means alone in reflecting such a dearth of historical information. The difficulties inherent in accessing relevant archival material no doubt play some role in contributing to this lacuna. However, two factors suggest the existence of a more fundamental unease with focusing on an individual State's negotiating stance. First, even where historians and political scientists have carried out the base research, academic lawyers have made little use of such resources.[15]

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[15] Note for instance, the infrequent references to works such as C Palley, *The United Kingdom and Human Rights*, Stevens, London, 1991; M Glen Johnson, 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights' (1987) 9 *Human Rights Quarterly* 19; M Glen Johnson, 'Historical Perspectives on Human Rights and United States Foreign Policy' (1980) 2 *Universal Human Rights* 6.

Secondly, within volumes tracing regional approaches to human rights, the tendency is to aggregate data from several countries, rather than provide segregated data from individual States.[16] The explanation for this process of excluding or marginalising a State's 'pre-ratification' history seems referable to the dominant constraining disciplinary and professional paradigms.

Certainly, the traditional view of the boundaries of international law does little to encourage retrospective investigation of a State's approach to developing norms of international law. Often in the context of demarking their discipline from international relations or politics,[17] international lawyers have tended to define international law as the study of global rules governing States.[18] The task of international lawyers is regarded as researching, analysing, and interpreting the objective meaning of such norms and assessing the extent to which States' behaviour complies with such norms. Practice of individual States is relevant to this task in so far as States develop these norms. Yet, once the norms have crystallised into treaty obligations or customary international law, past State practice is considered of marginal importance. It is the objectively interpreted 'final product' that forms the essence of international law. In order for the international rule of law to be respected, States must surrender attachment to subjective interpretation of norms in favour of the objectively understood, common intention. The *Vienna Convention on the Law of Treaties 1969*,[19] for instance, provides

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16 Leben's study of European historic approaches to human rights provides a good example of this tendency. Despite drawing practically all his examples from French practice, his conclusions are framed in terms of a European approach: see C Leben, 'Is there a European Approach to Human Rights' in P Alston (ed), *The European Union and Human Rights*, Oxford University Press, Oxford, 1999.

17 As to how international lawyers construct the boundaries of their discipline, see D Kennedy, 'A New Stream of International Law Scholarship' (1988) 7(1) *Wisconsin International Law Journal* 1; see too M Horwitz, 'The Conservative Tradition in the Writing of American Legal History' (1973) *American Journal of Legal History* 275, 281.

18 One standard text, for instance, states: 'there is common acceptance that international law is that law which governs relations between states, the basic units in the world political system during more than 300 years': L Henkin, RC Pugh, O Schachter, H Smit, *International Law: Cases and Materials*, West Publishing, Minnesota, 1980, lvii. It should be noted that many international lawyers have been active in promoting a broader conception of international law, in particular one that moves away from its traditional State centrism: see, for example, P Allot, *Eunomia: new order for a new world*, Oxford University Press, Oxford, 1990.

19 Vienna Convention on the Law of Treaties, 1969, opened for signature 23 May 1969, entered into force generally 27 January 1980, ATS 1974 No 2.

that treaty provisions are to be given their (universal) textual meaning viewed against the background of the object and purpose of the treaty (Article 31(1)). Statements made by State parties during the negotiations of a treaty (the *travaux préparatoires*) may only be investigated where the meaning of a clause is obscure or ambiguous,[20] and practitioners are warned to approach the *travaux* with discretion 'since its use may detract from the textual approach'.[21] Historical research that illuminates the 'common intention' of States might well be encouraged, but analysis of a State's individualised stance (other than in the particular area of establishing an individualised rule of customary international law) is regarded as of little utility.

In the field of international human rights law, the repudiation of subjective approaches to understanding international law has been particularly pronounced. Commentators routinely celebrate the development of specifically global norms. Paul Seighart, for instance, explained the underlying premise of his study of the international law of human rights as being:

> that a distinction can and should be made between what various commentators believe human rights ought to be, and what international law now says they are.... The latter is more suitable for lawyers, using their particular skills in the interpretation of legal texts and the application of the results to particular cases.[22]

Similarly Philip Alston has stated that human rights are:

> capable of partly transcending the institutions that gave birth to them, and those very same institutions (or their successors) which seek to exercise responsibility for their elaboration and interpretation.[23]

In the light of fierce attacks from cultural relativists[24] and critical legal scholars[25] on the utility and legitimacy of international norms of human rights, many international human

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20 Article 32, Vienna Convention of the Law of Treaties.

21 I Brownlie, *Principles of Public International Law* (4th ed), Oxford University Press, Oxford, 1990, 630.

22 P Seighart, *The International Law of Human Rights*, Clarendon Press, Oxford, 1983, xx.

23 P Alston, 'Introduction' in P Alston (ed), *Human Rights Law*, Dartmouth, Aldershot, 1996, xvi-xvii.

24 Cultural relativists have attacked the universality of human rights standards on the basis that some human rights might be antithetical to some cultures or at least modified application in order to respect existing cultural imperatives: see A Pollis, P Schwab, 'Human Rights: A Western Construct with Limited Applicability', in A Pollis, P Schwab (eds), *Human Rights: Cultural and Ideological Perspectives*, Praeger, New York, 1979, 8-14; J Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 *American Political Science Review* 303.

25 Critical legal scholars have argued that rights language is inherently indeterminate and diverts attention away from the need for political change: see for instance, M Tushnet, 'An Essay on Rights' (1984) *Texas Law Review* 1363, 1364-1371; M Koskenniemi, 'The Pull of the Mainstream' (1990) 88 *Michigan Law Review* 1946.

rights lawyers have been keen to defend the universal application and understanding of human rights guarantees.[26] The fervour with which such defences have been advanced suggests that the debate evokes personal interests and allegiances of a deep-seated nature.

To use an allusion drawn from the theoretical work of David Kennedy, there is a sense in which international human rights law seems to have become a 'proselytising faith'.[27] A State's ratification of international human rights standards is rarely questioned but is welcomed as the moment of conversion to a common creed.[28] In the case of States whose acceptance of the creed takes place 'later in life' (such as the United States of America's ratification of the ICCPR), there is particular celebration of the fact of conversion. Commentaries assume consensus as to the doctrines of the faith whilst allowing for some debate as to the interpretation of the creed. Analyses thus proceed on the basis of a shared 'human rights lexicon' that includes such features as the equality and interdependence of all forms of human rights, the unqualified right of all persons to enjoy human rights, the State's positive role in ensuring the enjoyment of rights and the international community's legitimate interest in scrutinising human rights practices.[29] Whilst State interest, or the interests of privileged members of a State are identified as residual threats to a State's implementation of its obligations,[30] commentators look upon a State's ratification of the human rights treaties as the harbinger of a new era for that State.

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26 Y Ghai, 'Human Rights and Governance: the Asia Debate', (1994) 15 *Australian Year Book of International Law* 1; P Williams, *The Alchemy of Race and Rights*, Harvard University Press, Cambridge, 1991, 151-3.

27 D Kennedy, 'When Renewal Repeats: Thinking Against the Box' (2000) 32 *New York Journal of International Law and Politics* 355, 359.

28 Note also David Kennedy's critique that international lawyers often regard the development of international law as a 'good thing, both inevitable and worth working quite hard for against formidable odds': D Kennedy, 'The Disciplines of International Law and Policy' (1999) 12(1) *Leiden Journal of International Law* 9, 23.

29 Note for instance the minimal level of dissonance between authors of international human rights texts and views expressed by the international bodies such as the Human Rights Committee or the ICESCR Committee.

30 M Dixon, R McCorquodale, *Cases and Materials on International Law* (3rd ed), Blackstone Press Limited, Cambridge, 2000, 184.

Against such a background, it is not surprising that existing studies of individual States' 'pre-ratification' human rights history have been largely excluded or marginalised from the mainstream literature. For international lawyers in general, the major task of analysis commences with the creation of international law norms, that is the point of ratification, at which subjective understandings become conceptually irrelevant. For those defending the merits of international human rights law, studies on individual State approaches might be regarded as a potential subversive distraction from the justification of common standards. At an extreme, it might be feared that considering in detail State's 'pre-ratification' history might justify a continuing relativism of approach to the definition or implementation of human rights standards.

In addition to focusing attention on Australia's 'post-ratification' human rights history, these paradigms have encouraged commentators to assume the existence of a common global language about human rights. The standards of the International Bill of Rights are quoted by government officials and community activists alike in the belief that the standards are understood by all to have the same content. Battlelines are drawn up on the basis that successive Australian governments understand and are committed to the shared objective meaning of international human rights standards. The major task is thus conceived as evaluating the practice of Australia against these fixed criteria and bringing the gaps between theory and practice to the attention of the government and the international community.

This thesis challenges these paradigms by revisiting Australia's engagement with human rights during the negotiations of the International Bill of Rights (1946-1966). It looks to Australian attitudes towards the substance of rights to be included in the international instruments, as well as the respective roles of the individual, the State and the international community in realizing those rights. The two impressionistic accounts identified above, the 'continuous support' and 'Cold War' narratives, are used as counterpoints in evaluating the patterns revealed.

What emerges from this study is that Australian 'international human rights policy' during the 1946-1966 period varied considerably. Amidst the variations, one dominant pattern is evident. In the course of the negotiations, Australia progressively disengaged with many of the elements accepted as part of the 'human rights lexicon' of 2001. Initially Australia promoted the equality of all forms of rights and supported active roles for the State in guaranteeing rights and for the international community in investigating violations. In the 1950s and 1960s Australia's policies dramatically reversed. Although the Cold War undermined faith in an 'impartial' international community, the dominant causal factors in producing this shift were domestic in nature. In Australia, human rights policy was determined by a succession of Ministers and bureaucrats. Rather than agreeing on the basic principles of human rights, these individuals brought to the task of policy-making distinct and divergent understandings of 'human rights', influenced by both party-political and non-partisan political perspectives. Deep-seated philosophical differences existed between Labor and Liberal Party Ministers as to, for instance, the role of the government in protecting the welfare of individuals. Similarly, actors differed in their assessment as to whether the individual or the State was the relevant reference point for the international negotiations. In terms of shaping the overall pattern of Australia's policy, the most dramatic watershed undoubtedly occurred with the replacement of Dr Evatt, a Labor Party 'internationalist' by the Liberal Party's PC Spender as Minister for External Affairs in 1949. Yet this thesis reveals also the influence of the bureaucratisation of policy development from 1952 onwards and the non-partisan political philosophies of both Ministerial and bureaucratic actors.

Not all policies, however, were subject to these domestic forces of change. Significant consensus surrounded the need to limit the universal and equal application of international human rights guarantees. Thus Australia consistently objected to the recognition of rights that would interfere with Australia's race-based immigration and indigenous policies, and to a lesser extent, Australia's entrenchment of sex-based discrimination. Whilst international pressure at times caused a softening of Australia's public objections, the underlying 'selective approach' to human rights remained

influential. Thus, in revealing both the patterns of continuity and divergence in Australian policy, this thesis debunks the myth of Australia's 'natural' and comprehensive acceptance of universal (commonly understood) international human rights guarantees.

It is not the contention of this thesis that the future trajectory of Australian responses to international human rights can be charted by reference to the 'pre-ratification' history alone. It would be inconsistent with this thesis' findings to assume such a continuity of policy given likely changes to the identity of policy makers and their personal and political conceptions of human rights. In addition, in this 'post-ratification' era, one has to consider the impact of the expression of views concerning the objective meaning of clauses by bodies such as the United Nations Human Rights Committee, the ICESCR Committee or regional bodies such as the European Court of Human Rights in shaping governmental understandings of human rights obligations. Notwithstanding these variables, the findings of this thesis remain of significance to contemporary analysis.

Australia's current human rights practice is properly considered not in isolation but as part of a continuum of Australia's historic encounters with the international human rights system. Many of the factors responsible for producing variant policies towards human rights during the negotiations are capable of replication, such as the possession of Labor versus Liberal allegiances or adherence to individual centred versus State-centric philosophic approaches.[31] Even though the terms of the International Bill of Rights are fixed, the elasticity of much of the language of the UDHR and the human rights Covenants permits such varying approaches to flourish in the form of divergent understandings of the proper 'objective textual' meaning of the international obligations. In the current international human rights regime which relies so heavily on self-regulation by States, clear dialogue between governments and members of civil society, including academic commentators, is vital. This thesis suggests that rather than

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31 As to the complex relationship between international law and State centrism, see A Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1986.

being able to assume a common understanding of international human rights standards between State and non-State actors, participants in the dialogue need to address the likelihood that others may possess quite distinct and contrary understandings of the same standards. There is thus a need to avoid false complacency regarding the 'shared goals' of actors committed to 'international human rights'. Hopefully this thesis will be of assistance in encouraging commentators to address directly the underlying assumptions that are likely to continue to play a role in Australia's ongoing formulation of policy.

Methodology and Sources

The commencement date of 1946 of this thesis relates to the earliest discussions of the Economic and Social Council of the United Nations in which the Commission on Human Rights was proposed. The Commission on Human Rights commenced the drafting of the International Bill of Rights in 1947. Whilst some use is made of material relating to discussions in the United Nations Conference on International Organisation held in San Francisco in 1945 (commonly known as the 'San Francisco Conference'), this thesis does not address in any detail Australia's stance on the inclusion of human rights guarantees within the United Nations Charter, a subject which has been the subject of some detailed scrutiny by others.[32] The end point of 1966 reflects the General Assembly's adoption of the ICCPR and ICESCR and Australia's signature of each Covenant.[33]

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[32] See eg WJ Hudson, *Australia and the New World Order: Evatt at San Francisco – 1945*, Australian Foreign Policy Papers, ANU, 1993; HV Evatt, *The United Nations*, Oxford University Press, Melbourne, 1948; P Hasluck, *Diplomatic Witness*, Melbourne University Press, Melbourne, 1980; LF Crisp, 'The Australian Full Employment Pledge at San Francisco', (1965) 19(1) *Australian Outlook* 18; JDE Plant, The Origins and Development of Australia's Policy and Posture at the United Nations Conference on International Organisation, San Francisco, 1945, PhD Thesis, ANU, 1967; P Hasluck, 'Australia and the Formation of the United Nations', (1954) XL (III) *Royal Australian Historical Society Journal and Proceedings* 133; N Greet, 'Australian Policy Towards the Emergent United Nations Organisation 1944-45, The Role of Dr H V Evatt and his Department of External Affairs', Honours Thesis, University of Adelaide, September 1990.

[33] The act of signature has some importance in international law. From the time of signature, a State comes under an obligation to refrain from acts calculated to frustrate the objects of the treaty: Article 18, Vienna Convention of the Law of Treaties.

Confining the period of examination to 1966 rather than covering the entire period of Australia's 'pre-ratification' history can be justified on several bases. By concentrating on the period of Australia's participation in the formulation of standards, one is looking at the most formative years of policy development. Secondly, the period 1946-1966 enjoys a certain historic coherence in domestic terms in terms of sharing what might be termed the 'post World War II culture', a period predating the significant upheaval of the Vietnam years.[34] Even within this period, one has to take account of significant political changes – with Labor and Liberal administrations, six Ministers for External Affairs and the impact of nascent social movements associated in particular with women's liberation and indigenous rights. Thirdly, the Commonwealth Archives Act 1988 gives researchers access only to materials more than 30 years old.[35] Thus while most of the Commonwealth material relating to pre-1966 negotiations could be obtained, the publicly available documentation relating to the post-1966 discussions remains less substantial.

In looking at Australian policy, or the policy of the Australian State (terms that are used interchangeably in this thesis), this thesis focuses on policy authored by the federal government in the relevant periods. At times details of the contributions of the state governments[36] are included as are details of submissions by members of 'civil society'. However, this thesis does not purport to consider the response of the Australian State most broadly defined. Furthermore, when discussing Australia's 'human rights policy', this thesis does not examine the domestic impact of Australia's involvement in the international debate – for example, whether domestic legislatures amended laws or pressure mounted for change to legal or administrative systems as a result of (any) increase in currency of the international human rights terminology.

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34 On 29 April 1965, Prime Minister Menzies announced the Australian Government's decision to commit troops to South Vietnam: see A Watt, *The Evolution of Australian Foreign Policy, 1938-1965*, Cambridge University Press, Cambridge, 1968, 183. The years of Australia's involvement in the Vietnam witnessed considerable social upheaval and social mobilisation around issues of indigenous rights, women's rights and militarism.

35 Records created in the last thirty years are closed to the public, except in so far as they are released under an application of the *Freedom of Information Act 1982* (Cth).

36 Note in this thesis, the term 'State' is used to refer to the nation-State, and 'state' to the constituent units within the nation-State.

In unearthing the story of Australia's international legal history, primary reliance has been placed on archival material held in the National Archives of Australia. In terms of the raw documentation available, the task was at times somewhat overwhelming. In addition to the reports and memoranda in files of the Department of External Affairs (the predecessor of the Department of Foreign Affairs and Trade who had primary policy carriage of Australia's international human rights policy), there were numerous files created by the Attorney-General's Department, the Prime Minister's Department, and the Departments of Territories, Labour and National Service, Immigration, Health and the Office of Education. This material has been augmented by a study of the official pronouncements of Australian representatives at international forums including the Commission on Human Rights, the General Assembly and specialist General Assembly committees. The archival records of the United Nations Secretariat in New York and Geneva provided a valuable source of further information regarding the responses of the Australian government to complaints by individuals.

Useful background information was also obtained from an exploration of personal records and recollections of participants in the process of negotiations. A number of Australian bureaucrats involved in Australia's developing policy were generous in providing their personal recollections by way of interview and correspondence. Interviewees included Dr John Burton, Ms Elizabeth Decolgnon (nee Warren), Mr Patrick Brazil, Professor Peter Bailey, and Sir Walter Crocker. Professor Ronald McDonald, who for a lengthy period was the Canadian representative on the Commission on Human Rights, and Professor Oscar Schachter, who had been a Director of Legal Affairs within the UN Secretariat, were also able to provide information on other delegations' perceptions of Australian policy makers and Australian policy. Useful correspondence was conducted with Sir Arthur Tange and Gough Whitlam (concerning his father, HFE (Fred) Whitlam).[37] Other publicly

[37] Unfortunately, there is no public collection of HFE Whitlam's papers.

available information included the oral interviews and memoirs of participants.[38] Fortunately, a number of participants in the policy development process left their papers to the National Library or the National Archives of Australia including Percy Spender, Richard Casey, Robert Menzies, Garfield Barwick, and Kenneth Bailey. The National Library has also a collection of interviews with some participants in the negotiations as does the United Nations Dag Hammarskjold Library in New York. Use has also been made of the Plimsoll papers held by the Department of Foreign Affairs and Trade and the Evatt Collection of the University of Adelaide.

Of lesser quantity, but nevertheless significant value, were the secondary reference materials relating to the negotiations of the International Bill of Rights. In the Australian context, there are the contemporary evaluations of policy provided by Geoffrey Sawer, Neville Harper and David Sissons.[39] Excellent compilations of the travaux préparatoires from the ICCPR, the ICESCR and the UDHR[40] have been used to place the Australian contribution in its wider context. There are of course also the general works on the human rights instruments that provided more limited assistance[41] and numerous works on Australian history.

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38 Many of the direct Australian participants in the process were however circumspect on the subject of Australia's stance during the international human rights negotiations. The negotiations of the International Bill of Rights are not mentioned in P Hasluck, *Mucking About: An Autobiography*, Melbourne University Press, Melbourne, 1977; RG Menzies, *Afternoon Light: Some Memories of Men and Events*, Cassell, Melbourne, 1967; TB Millar, *Australian Foreign Minister: The Diaries of RG Casey*, 1951-60, Collins, London, 1972; P Spender, *Exercises in Diplomacy: the ANZSUS Treaty and the Colombo Plan*, Sydney University Press, Sydney 1969; G Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections*, Federation Press, Sydney, 1995. Of greater use were the diaries and memoirs of Professor John Humphrey, the Director, United Nations Division of Human Rights during much of the drafting period: JP Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, New York 1984; AJ Hobbins (ed), *On the Edge of Greatness: The Diaries of John Humphrey*, vol 1, McGill University Library, Montreal, 1994.

39 G Sawer, op cit; N Harper, D Sissons, *op cit.*

40 MJ Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987; MCR Craven, *op cit*; M Nowak, *op cit;* and J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999.

41 L Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981; LB Sohn, T Buergenthal, *International Protection of Human Rights*, Bobbs-Merrill Company, Indianapolis, 1973; P Alston, H Steiner, *International Human Rights in Context: Law Politics, Morals*, Clarendon Press, Oxford, 1996; P Seighart, *op cit.*

As with any analysis based so heavily on archival material, there are inevitable limitations to the available documentation. Within the departmental files for instance, there is the somewhat prosaic difficulty of discerning the 'final copy' of a document or ascertaining whether a particular submission was ever lodged with its intended recipient. Some key documents are referred to, but elusive to discover. Officials varied in the extent to which they kept notes of proceedings and judgements have to be occasionally made as to whether later amendments to the record were motivated by external pressure, reconsideration or faulty transcriptions. It is clear that not all exchanges between officials, let alone Ministers and officials were recorded for perpetuity.[42] Memoirs also have to be approached with caution given that recollections can vary according to personal persuasions as well as varying experiences. Furthermore, both individuals and institutions such as public service departments may create and maintain steadfast mythologies that distort the record through, for instance embellishing perceived achievements or attempting to recreate history in later memorandums of accounts. As far as possible, this thesis limits reliance on subsequent accounts, preferring to draw conclusions from the remaining contemporary evidence.

Allowance also has to be made for the occasional discrepancies between United Nations official records and Australian departmental records. In most United Nations forums other than the General Assembly, the records kept of proceedings were summary rather than verbatim in form. Whilst delegations had the opportunity to comment on the accuracy of the summary record and in some cases to provide the Secretariat of the United Nations with preferred transcripts of their speeches, the form of the official record often varies considerably from the file copy of a statement. In the present study, priority has been given to the full statement appearing in the Australian file. The basis

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[42] The propensity of Dr Evatt, Australia's Minister for External Affairs during the first three years of Australia's involvement with the Commission on Human Rights, to avoid giving written directions has received particular mention by Paul Hasluck who served as a bureaucrat under Evatt and in later years was himself to become Minister for External Affairs: see P Hasluck, *Diplomatic Witness*, *op cit*, 31. Whilst Hasluck attributes this propensity to Evatt's desire not to be 'hedged in', Dr John Burton, Evatt's personal secretary and one-time Secretary of the Department of External Affairs has suggested more charitably that Evatt's tendency was to talk around a subject, giving bureaucrats the base reasoning from which they were expected to draw the proper conclusions: Interview with Dr John Burton, conducted by author, 1 September 1999, Canberra.

for this preferment has been that the risk that the statement was not read out in full is outweighed by the fuller understanding of a delegate's intention revealed in the full version of a speech. It will also be noted this thesis uses a modified form of referencing speeches in United Nations forum. The date cited in references is the date on which the meeting was held rather than the date the United Nations record was published.[43] This permits greater clarity in analysing the development of Australian policy.

In recognition of the variety of subject matters encompassed within the International Bill of Rights, this thesis adopts a thematic approach. Within each Chapter, a chronological approach is used to explore the level of consistency or inconsistency in Australian policy. Reference is made to eras of policy development that broadly reflect stages of policy development. Yet, there is not necessarily an equal treatment of all periods. Indeed the earliest six years of the negotiations attract a disproportionate amount of attention in this study. This weighting reflects the significantly greater amount of policy consideration that occurred during these early years. Although international discussions continued in the 1953-1966 period, Australia's policy on many topics had become fixed by 1952. General restatements of existing policy became a frequent feature of Australian Briefs and Australian contributions to debate. The advantage of presenting Australian policies over the entire negotiations, however, is that the longer time frame permits an evaluation of the extent to which external and internal factors influenced Australian policy.

In a study of such a limited size, it has not been possible to present Australia's policy towards each clause of the International Bill of Rights. Instead, topics have been chosen so as to elucidate the major philosophical trends in Australian policy. The first four Chapters of this thesis deal with Australian policies with respect to the nature and content of human rights. Chapters 1 and 2 consider the detail of Australian policy towards economic and social rights and civil and political rights respectively. The fifth

[43] In certain cases this has not been possible. To distinguish between the two cases, dates written in full (eg 8 November 1957) refer to the date of the meeting, whereas dates in abbreviated form (eg 8/11/57) should be taken as referring to the date of the publication of the record.

orthodox category of rights, cultural rights, is dealt with in part as part of Chapter 3. Chapter 3 examines Australian policy on minority rights and the right to self-determination. Chapter 4 looks more broadly at the jurisprudential assumptions of Australian policy makers. Chapters 5,6 and 7 turn to Australian policies concerning the implementation of rights. Chapter 5 considers the topic of States' obligations to implement human rights within their domestic systems while Chapter 6 deals with the topic of preferred models of international implementation of the twin Covenants. Chapter 7 presents an examination of Australia's parallel policies on the international community's involvement in scrutinising human rights outside the contexts of the covenants, bringing to the fore the debate over 'domestic jurisdiction.' The Conclusion highlights the ongoing significance of the thesis' findings by drawing out some of the parallels between Australia's 'pre-ratification' and 'post-ratification' attitudes towards international human rights. In order to appreciate the broader context in which these policies were being developed, this Introduction concludes with a brief overview of international and domestic context in which negotiations took place.

International and Domestic Developments 1946-1966

As scholars of the international human rights movement have documented, the idea of human rights germinated in religious and political treatises over several centuries.[44] However, it was not until after the establishment of the United Nations following World War Two that negotiations for the establishment of a code of international human rights commenced. In a reaction to the atrocities that occurred during the war and individual's experiences of privation, oppression and terror, human rights were seen as a touchstone for guaranteeing a better future. The President of the United States, Franklin D Roosevelt, for instance, in his State of the Union Address on 6 January 1941, referred to

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[44] Scholars have traced early precedents of modern human rights ideals for instance in the writings of theologians like Thomas Aquinas and political theorists like Jean-Jacques Rousseau, John Stuart Mill, and John Hobbes. Significance has also been attached to the constitutionalising of rights in the United States and France in the eighteenth century: see L Henkin, *The Age of Rights*, Columbia University Press, New York, 1990, Introduction and Chapter 1; J Shestack, 'The Jurisprudence of Human Rights' in T Meron (ed), *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford, 1984, 70.

the 'supremacy of human rights everywhere'. The four freedoms he identified, freedom of speech, freedom of belief, freedom from fear and freedom from want,[45] were later incorporated in the Atlantic Charter between the United States and the United Kingdom.[46]

When international delegates met to negotiate the establishment of the United Nations, respect for human rights was regarded as an essential pre-requisite for long-lasting peace. At both the Dumbarton Oaks preparatory conference in Washington in 1944 and the United Nations Conference on International Organisation in San Francisco in 1945, attempts were made to have human rights obligations entrenched in the United Nations Charter.[47] Majority support was forthcoming only for a more modest proposal to refer in general terms to States' obligations to respect human rights.[48] Thus Article 1(3) of the Charter stated that one of the purposes of the United Nations was to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'. Article 55 imposed an obligation of the United Nations to promote 'universal respect for, and observance of, human rights and fundamental freedoms' whilst in Article 56, members of the United Nations pledged themselves to take joint and separate action in cooperation with the United

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45 As M Glen Johnson has pointed out, FD Roosevelt's initial conception of 'freedom from want' was not related to economic rights for individuals but was described in free trade terms – the 'removal of certain barriers between nations, cultural in the first place and commercial in the second place': M Glen Johnson, 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights' (1987) 9 *Human Rights Quarterly* 19, 21.

46 Evatt quoted with approval President Roosevelt's 'Four Freedoms' speech and the Atlantic Charter is his first Ministerial speech: Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard),* Vol 169, 27 November 1941, 978.

47 Some of the earliest American drafts of the UN Charter incorporated a declaration of human rights whilst Panama, Chile, South Africa and Mexcio sponsored proposals during the San Francisco Conference to have a Bill of Rights included: see D McGoldrick, *The Human Rights Committee: Its Role in the Development on Civil and Political Rights*, Clarendon Press, Oxford, 1991, 3-4; J P Humphrey, 'The UN Charter and the Universal Declaration of Human Rights in E Luard (ed), *The International Protection of Human Rights*, Thames and Hudson, London, 1967, 46; P Meyer, 'The International Bill: A Brief History' in P Williams (ed), *The International Bill of Human Rights*, Entwhistle Books, California, 1981; J Huston, 'Human Rights Enforcement Issues at the UN Conference on International Organization' (1967) 53 *Iowa Law Review* 272.

48 Particular opposition to these proposals emanated from the British and Soviet delegations – the former apparently concerned with the implications of such a document for British imperial power and the latter fearing that the United Nations would become a tool to protect fascism and interfere in the domestic jurisdiction of individual countries: See M Glen Johnson, 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights' (1987) 9 *Human Rights Quarterly* 19, 24-5.

Nations in pursuance of this purpose. An Economic and Social Council was established. One of its purposes was to make recommendations for the promotion of human rights[49] and prepare draft conventions for submission to the General Assembly on matters within its competence.[50] The Economic and Social Council was also to establish a Commission for the promotion of human rights.[51]

In 1946, the Economic and Social Council duly established the Commission on Human Rights. The Commission's specific terms of reference included submitting reports and proposals to the Council on the establishment of an international bill of rights. It was also mandated to make proposals concerning specialist conventions on civil liberties, the status of women, freedom of information and similar matters. [52] The Commission on Human Rights commenced its first session in January 1947 with Australia as one of its foundational members.[53]

Early sessions of the Commission on Human Rights were dominated by discussions on the best way of proceeding for the Commission on Human Rights. In particular there was disagreement as to whether efforts should be concentrated on drafting a non-binding declaration or a binding covenant.[54] After heated debate during 1947 and 1948, the Commission resolved to work concurrently on a declaration and a covenant with separate drafting groups for each. A third working group was also set up on the specific issue of implementation of rights. The draft UDHR was completed relatively quickly

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49 Article 72, UN Charter.

50 Article 62(3), UN Charter.

51 Article 68, UN Charter.

52 J Morsink, *op cit*, 13.

53 A nuclear preparatory committee which met in April and May 1946, determined that there should be an equitable geographical distribution amongst members of the Commission. The first members of the Commission were: Australia, Belgium, Byelorussian Soviet Socialist Republic (BSSR), Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippine Republic, United Kingdom, United States of America, Union of Soviet Socialist Republic (USSR), Uruguay and Yugoslavia: J Morsink, *op cit*, 4; JP Humphrey, *Human Rights and the United Nations: A Great Adventure*, Dobbs Ferry, New York, 1984, 17.

54 There was also significant disquiet about initial attempts to narrow those involved in the drafting process: J Morsink, *op cit* 5.

and was transmitted to the Third Committee of the General Assembly[55] in September 1948. It was adopted by the General Assembly on 10 December 1948.

The negotiation of the binding instrument(s) on human rights took far longer. From 1948 until 1952, debate raged about whether there should be one or two Covenants. In a process that is explained further in Chapter 1, the General Assembly ultimately resolved the question in favour of two Covenants: one to deal with civil and political rights, the other to deal with economic, social and cultural rights.[56] The Commission on Human Rights completed its consideration of the Covenants at its 10th Session in 1954, at which stage it referred the draft ICCPR and ICESCR to the General Assembly. In forwarding on the completed drafts, the Commission on Human Rights was to describe the Covenants as representing 'a broad compromise between differing political, economic and cultural opinions and, while not ideal, should be regarded as fairly satisfactory'.[57] The Third Committee of the General Assembly took up the task of reviewing these draft covenants, a task that took some eleven years. On 16 December 1966, the ICESCR, ICCPR, and Optional Protocol to the ICCPR were adopted by the General Assembly and opened for signature. Although it has been ranked as a 'second-tier participant' in drafting the UDHR by John Humphrey,[58] Australia was a constant participant in negotiations for the International Bill of Rights. Australia was a member of the Commission on Human Rights during the key period 1947-1954 and was an active participant in debates in the Third Committee of the General Assembly.

The negotiations of the International Bill took place against a volatile international situation. From the infancy of the United Nations, there was tension between the United States and the Soviet Union (USSR) as to the international balance of power.

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55 The Third Committee of the General Assembly is the Committee on Social and Humanitarian Affairs.

56 GA Resolution 453 (VI), 6 UN GAOR Resolutions Supp No 20, 36. Note though, each Covenant was to have a number of similar provisions – including recognition of the equality of men and women and the right to self-determination and to provide for the application of human rights to colonial and dependent territories.

57 UN Doc A/2808, quoted in MCR Craven, *op cit*, 20.

58 J Morsink, *op cit*, 32.

The Soviet Union at the San Francisco Conference, for instance, would not support expansive powers for the new international organisation, fearing that the powers of the United Nations would be marshalled against the Eastern bloc countries.[59] In 1946, Winston Churchill, the Prime Minister of the United Kingdom, announced that an Iron Curtain had descended across Europe.[60] The intensity of the Cold War ebbed and flowed during the 1950s and 1960s. International relations commentators have suggested that after the Cuban missile crisis in 1963 the international community entered a period of 'détente'. Tensions remained high such that participation in the Vietnam conflict was regarded in largely ideological terms. Negotiations of the Commission on Human Rights were not immune from these tensions. It was not uncommon for delegates, particularly those from the United States and the USSR, to question the commitment to human rights of their adversaries.[61]

A secondary force in international relations of the period was the effect of widespread decolonisation in the wake of World War Two. Former territories of the Netherlands and Belgium were given their independence in rapid succession. Pressure mounted on administering States like the United Kingdom and Australia to grant self-government and independence in relation to trust and non-self-governing territories. The most enthusiastic advocates of decolonisation and self-determination were States who had recently won their independence and whose entry into the United Nations dramatically shifted the balance of power.[62] In the negotiations of the International Bill of Rights, the changed composition of the Third Committee of the General Assembly was reflected in the emphasis on matters of racial discrimination and the application of human rights to trust and non self-governing territories.

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59 JP Humphrey, 'The UN Charter and the Universal Declaration of Human Rights' in E Luard, *op cit*, 46.

60 M Burgmann, 'Hot and Cold: Dr Evatt and the Russians, 1945-1949' in A Curthoys, J Merritt (eds), *Australia's First Cold War, 1945-1953: Society, Communism and Culture*, Allen and Unwin, Sydney, 1984, 82.

61 See discussion, J Morsink, *op cit*, 95.

62 In 1955, for instance, 16 new members were admitted to the United Nations and a further 7 in the period 1956-1958. Most of these new members were newly independent colonies and formed an unaligned group commonly termed the 'Afro-Asian' bloc in Australian documentation: see D Lowe, 'Australia at the United Nations in the 1950's: The Paradox of Empire' (1997) 51(2) *Australian Journal of International Affairs* 171, 173.

Within Australia, there were also significant developments in the 1946-1966 period. The earliest years of Australia's post-war history were dominated by the Australian Labor Party's efforts to re-establish Australia after the trauma of the war. The Labor Party, committed to democratic socialism, attempted to nationalise industries in order to better provide for the reconstruction. Although successful in creating a Commonwealth Bank and establishing central marketing boards for many primary industries, the Labor Party was thwarted in its more ambitious programmes, such as nationalising the banks.[63] With the Liberal/Country Party electoral victory in 1949, Sir Robert Menzies commenced his 16-year term as Prime Minister. The popular image of this period was of stability and high employment, the years that would produce what are known today as the 'baby boomers'. Anti-communist sentiment became more pronounced in the early 1950s,[64] fostered in part by the commitment of the Liberal Party to root out both communism and socialism from Australia. Robert Menzies declared a war on communists, attempting to pass draconian legislation to ban the communist party.[65] Fear of invasion, racism and xenophobia combined to produce a fear of invasion from Australia's Asian neighbours.[66] A massive immigration campaign continued throughout the period in order to boost Australia's defence capabilities and overcome labour shortages in key industries. The White Australia Policy[67] instituted at the turn of the century was regarded as vital to maintain social cohesion in Australia. Assimilation of indigenous persons in Australia and in Australian external territories was also taken for granted as the most appropriate means of integrating potentially clashing cultures.

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63 The Privy Council held that the *Banking Act 1947* infringed the freedom of interstate trade and commerce protected under s92 of the Commonwealth Constitution.

64 See D Lowe, *Menzies and the 'Great World Struggle: Australia's Cold War 1948-1954*, University of New South Wales Press, Sydney, 1999; A Curthoys, J Merrit *op cit*, and A Curthoys, J Merrit (eds), *Better Dead than Red*, Allen and Unwin, Sydney 1986.

65 Menzies' introduction of the *Communist Party Bill 1950* is discussed further in Chapter 1. For an interesting study of this saga, see F Cain, F Farrell, 'Menzies war on the Communist Party, 1949-1951', in A Curthoys, J Merritt, *Australia's First Cold War, op cit*, Chapter 5.

66 D Lowe, *Menzies and the 'Great World Struggle: Australia's Cold War 1948-1954, op cit,* 6, 7.

67 The White Australia Policy was a policy of restricting 'non-White' migration to Australia, particularly by excluding those from Asia and Africa. It is discussed in more detail in Chapters 2 and 3.

Change was also evident in the identity of those responsible for shaping Australian international human rights policies. At a political level, there were six Ministers for External Affairs[68] bearing ultimate responsibility for Australia's public stance: Dr ('Doc') HV Evatt,[69] Percy Spender,[70] Richard Casey,[71] Prime Minister Robert Menzies,[72] Garfield Barwick[73]and Paul Hasluck.[74] Fortunately, the lives of these Ministers have been well documented.[75] Considered as a group, these political ministers have impressive legal credentials. Two members were either former or future members of the High Court (Evatt and Barwick). Another of the group became a member of the International Court of Justice (Spender). Evatt and Menzies, in particular were noted jurists and achieved recognition as talented public law barristers before entering politics.[76] Evatt had the added distinction of being elected as President of the General Assembly of the United Nations in 1948.

Yet, not all these Ministers played an equal role in policy development. As later Chapters of this thesis will demonstrate, Evatt and Spender stand out as having been most active in shaping policy directions. Casey showed less initiative. His initial approach was to approve the continuation of Spender's policy while urging delegations to avoid becoming internationally isolated. Within a year of Casey taking office in 1951, the burden of policy development had shifted to the bureaucratic level. During

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68 A Timeline showing the stages in the development of the International Bill of Rights and the periods in office of the Australian Ministers for External Affairs is included in Appendix 1.

69 Dr HV Evatt, Minister for External Affairs, October 1941 – December 1949.

70 PC Spender, Minister for External Affairs, December 1949- April 1951. Spender continued to have some influence on policy development in his subsequent appointment as Ambassador to the United States. Note that a number of Australian State actors mentioned in this study including all the Liberal Ministers and senior public servants including KH Bailey, AS Watt, J Plimsoll, AH Tange received knighthoods either during the period of study or in later years. In order to focus on the individual's contributions rather than their date of receipt of honours, this thesis has not used titles such as 'Sir' unless the individual received such honours before the commencement point of this thesis in 1946 or unless the relevant documents quoted refer to such titles.

71 RG Casey, Minister for External Affairs April 1951 – February 1960.

72 RG Menzies, Minister for External Affairs, February 1960- December 1961.

73 G Barwick, Minister for External Affairs, December 1961 – April 1964.

74 P Hasluck, Minister for External Affairs, April 1964 – February 1969.

75 See fn 38 above.

76 As to Menzies' career as a barrister (including his appearance in the Engineers case) see AW Martin, *Robert Menzies: a life, vol 1: 1894-1943*, Melbourne University Press, Melbourne, Chapter 2. As to Evatt's early career, see, K Tennant, *Evatt: Politics and Justice*, Angus and Robertson, Sydney, 1972, Chapters 3,4.

the subsequent Ministries of Menzies, Barwick and Hasluck, there was little attempt to reclaim the policy-making initiative. With the exception of high profile international issues such as racial discrimination and the administration of trust and non-self-governing territories, few Ministerial directives on policy development were issued. Instead, bureaucrats formulated policies and embodied them in Briefs that appear to have been given only cursory attention by Ministers. In part Ministerial disassociation from direct policy development may have resulted from the burgeoning size of the Department of External Affairs. Geoffrey Sawer noted that as the Department of External Affairs expanded Ministers were no longer able to take as personal an interest in policies administered by their Department.[77] Yet given the speed with which Ministers intervened in relation to sensitive topics such as racial discrimination, the Ministerial neglect does seem to indicate a lack of political interest in the negotiations. In order to reflect the dominant influences in Australian policy development, this thesis adopts the following categories: the 'Evatt period' (1946-1949), the 'Spender period' (1950-1951) and the 'Casey and Bureaucratic period' (1951-1966).

Two public servants emerge as having been particularly influential in the Bureaucratic phase of policy development: HFE (Fred) Whitlam and Kenneth Bailey. No biography of either has yet been published. Fred Whitlam (who may be best known to a modern Australian audience as the father of a former Australian Prime Minister, Gough Whitlam[78]) was initially Crown-Solicitor during the Evatt period. After his retirement, he was appointed as a consultant to represent Australia at the Commission on Human Rights for the years 1950-1954. Kenneth Bailey, often known as 'Professor Bailey' in recognition of his original career as a law academic at Melbourne University, was also brought into the Commonwealth public service at the behest of Evatt,[79] but served under

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77 G Sawer, 'The United Nations', in G Greenwood and N Harper, *Australia in World Affairs*, 1950-1955, Cheshire, Melbourne, 1957, 123. JDB Miller has provided statistics on the growth of the Department: in 1939, the Department of External Affairs had a staff of some 28 persons, including 3 officers posted overseas. By 1957, the Department had 835 staff, including 509 persons overseas: JDB Miller, *Australian Government and Politics: An Introductory Survey*, Duckworth, London, 1959, 210.

78 See G Whitlam, *Abiding Interests*, University of Queensland Press, Brisbane, 1997, 282.

79 Interview with Peter Bailey, conducted by author, 4 March 2001, Canberra.

Labor and Liberal governments. He had a distinguished career as Secretary of the Attorney-General's Department and Commonwealth Solicitor-General (1946-1964). A secondary tier of influential public servants included, in the earliest years, Colonel Roy Hodgson, Ralph Harry, Terence Glasheen, Alan Watt, Eric Heyward, and Alan Loomes, and in later years, Arthur Tange, Bill Doig, John Petherbridge, Trevor Pyman, James Plimsoll, Dr Anstey Wynes, Leslie Lyons and Patrick Brazil. Once again the calibre of intellect involved in developing process is remarkable. At least four of these persons either were at the time or went on to become Secretary of the Department of External Affairs.[80] Numerous other prominent public servants are revealed as having played more minor roles.

Individual Chapters will bring to light the significant changes in outlook between many of these politicians and bureaucrats. Yet, this thesis does more than underline the roles of individuals in creating history. This thesis identifies the underlying variations in philosophic attitudes that shaped Australia's dynamic human rights policy, variations that may well be replicated in the future. During the negotiations of the International Bill of Rights, the Israeli delegate warned that the generality of language adopted in the international instruments would open the way for conflicting interpretations.[81] Hopefully this thesis will add to the existing scholarship by highlighting the likelihood of unresolved philosophical approaches feeding into future Australian States' interpretations of their international human rights obligations.

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80 The four are : Colonel Roy Hodgson, Alan Watt, Arthur Tange and James Plimsoll. A fifth, Patrick Brazil, went on to become Secretary of the Attorney-General's Department.

81 UN Doc A/C.3/SR 728, quoted by MCR Craven, *op cit*, 25.

Chapter 1

Economic and Social Rights

Introduction

This Chapter focuses on Australia's response to the development of economic and social rights in the International Bill of Rights.[1] References to the ideological conflict that surrounded these rights abound in the international literature. Mathew Craven, for instance, in his work on the ICESCR, argues that the reason for the separation of economic, social and cultural rights and civil and political rights into two Covenants was the 'ideological conflict between East and West pursued in the arena of human rights during the drafting of the Covenant.'[2] While the Eastern bloc is seen as having championed the cause of economic and social rights, Western States are viewed as having asserted the priority of civil and political rights 'as being the foundation of liberty and democracy in the "free world"'.[3] The criteria for membership of the Eastern and Western blocs are assumed rather than spelt out: Eastern bloc countries being those which supported revolutionary communism and Western countries being those committed to what Louis Henkin has termed 'democratic-libertarian' principles.[4] Given Australia's categorisation as a Western State on this analysis, the impression created by references such as Craven's is that Australia was part of a group whose hostility to economic and social rights arose within the context of the international tensions between the United States and the Soviet Union. An examination of Australia's stance

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1 Although the ICESCR contains economic, social and cultural rights, much of the debate during the negotiations centred around what were called economic and social rights. This terminology has thus been followed in this Chapter. Cultural rights are dealt with in part in Chapter 3.

2 MCR Craven, *The International Covenant on Economic, Social and Cultural Rights*, Clarendon Press, Oxford, 1995, 8-9.

3 *Ibid*, 9, citing H Gros Espiel, 'The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches' in B Ramcharan (ed), *Human Rights Thirty Years After the Universal Declaration*, Martinus Nijhoff, The Hague, 1979, 41; M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, Strasbourg, 1993, xx.

4 L Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 10. Note Jack Donnelly's purposive use of more refined categories within the Western group to highlight the differences between Western States – in particular the differences between the United States and what are termed the 'like-minded States: J Donnelly, *International Human Rights*, Westview Press, Boulder, 1993, 125-132.

reveals a more complex, internally-focussed approach to economic and social rights by Australian policy makers.

Throughout the negotiations of the International Bill of Rights, all Australian delegations proclaimed the importance of economic and social rights. This unanimity belied the extent of differences of opinion as to the nature and status of such rights. During the immediate post-war years, under the leadership of Dr HV Evatt, Australia evinced enthusiasm for international guarantees of economic social rights that could be used in the domestic sphere to improve conditions for the 'working man'. It was an enthusiasm fired by the Labor Party's ease with government's responsibility for the economic and social conditions of individuals' lives. Once the Liberal-Country Party gained power in 1949 and PC (Percy) Spender took over as Minister for External Affairs, Australia's policies altered. Self-actuating individuals became the model of desirable economic growth. Government involvement in matters of economic development was to be limited in general. Within the field of human rights, government assistance was appropriate where individuals had demonstrated their worthiness by fulfilling their duties to society. Following Spender's departure from office in 1951, Richard Casey cemented Spender's policies and permitted senior bureaucrats to develop a policy of stressing the aspirational nature of economic and social rights. During the remainder of the negotiations, Australian policy was to be a policy of containment – whereby economic and social rights would have minimal impact on Australian domestic policies.

Not all aspects of Australian policy were marked by divergence. Typically, however, consensus surrounded policies of resistance rather than policies of support. Women's economic rights, in particular, were marginalised and excluded from the serious consideration given to other rights. In both the areas of policy continuity and divergence, therefore, Australian attitudes towards economic and social rights reflect the influence of deep-seated domestic political philosophies and prejudices. Whilst participants were aware of the Cold War and pressures to conform to the stance adopted

by traditional allies such as the United Kingdom and the United States, Australian policy primarily reflected ideological and structural divisions within Australia.

In order to situate Australian policy within its international context, this Chapter commences with a brief overview of the international debate concerning economic and social rights. In the substantive discussion of Australian policy that follows, two sub-topics have been chosen for particular analysis: first, Australia's attitude towards economic and social rights (in particular vis-à-vis civil and political rights); and secondly, Australia's contributions and responses to the content of economic and social rights.

Overview of the International Debate

Recent scholarship has unveiled the longstanding heritage of recognition of economic and social rights.[5] When the Commission on Human Rights drafted the UDHR, a significant number of its Articles embodied economic or social rights. The UDHR protected an individual's rights to own property (Article 17), to work and reasonable conditions of work (Articles 23,24), to social security (Article 22), to an adequate standard of living (Article 25), to education (Article 27), as well as recognising an individual's freedom of association (Article 20). Rather than having been urged upon a reluctant Commission on Human Rights by a particular State or States, the drafters of the UDHR seem to have considered it desirable that recognition be given to economic, social, cultural, civil and political rights.[6] As Johannes Morsink has revealed, behind the façade of unanimity lay some concern that economic and social rights should be distinguished from civil and political rights.[7] Nonetheless, in the context of a non-binding Declaration, differing views on the status of economic and social rights could

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5 See A Eide, C Krause, A Rosas, *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff, Dordrecht, 1995, 27-28; C Leben, 'Is there a European Approach to Human Rights' in P Alston (ed), *The European Union and Human Rights*, Oxford University Press, Oxford, 1999, 75.

6 For a detailed history of the UDHR's drafting, see: J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999, 75.

7 J Morsink, 'The Philosophy of the UDHR' (1984) 6 *Human Rights Quarterly* 309, quoted in MCR Craven, *op cit*, 17, fn 87.

be accommodated. Once the attention of the Commission moved to the preparation of a binding international Covenant, differences of opinion soon emerged as to the status and nature of economic and social rights. Debate over this topic was to generate more passion than any other topic in the International Bill of Rights, with the possible exception of the right to self-determination.

From 1949 until 1952, the issue of whether there should be one Covenant containing all forms of rights or a separation of economic and social rights from civil and political rights was unresolved.[8] Those on the Working Group delegated the task of drafting the Covenant on Human Rights side-stepped the issue by focusing 'for ease of drafting', on the drafting of civil and political rights.[9] When the relative neglect of economic and social rights was raised in the plenary sessions of the Commission on Human Rights, no consensus could be reached. At the Fifth Session of the Commission on Human Rights in early 1950, the Commission resolved to limit the Covenant to civil and political rights with a view to adopting further Covenants on other rights at a later stage.[10] Opinions remained divided. The issue was agitated further in the subsequent session of the governing body of the Commission on Human Rights, the Economic and Social Council (ECOSOC). ECOSOC requested the General Assembly to make a policy decision on the issue of whether there should be one or two Covenants.[11] After what Craven has termed 'a long and acrimonious debate',[12] the General Assembly directed the Commission to draft a single Covenant.[13] In so doing, the General Assembly affirmed the interconnectedness and interdependency of all rights.[14] The Commission on Human Rights duly drafted some fourteen substantive articles, but cordoned off

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8 For an account of the general debate, see MCR Craven, *op cit*, 18-20; S Hoare 'The United Nations Commission on Human Rights' in E Luard, *The International Protection of Human Rights*, Thames and Hudson, London, 1967.

9 In 1950, for instance, the draft Covenant embodied only civil and political rights. Draft economic and social rights were sent to States as 'proposed additional articles': MCR Craven, *op cit*, 18

10 11 UN ESCOR Supp (No 5) 1950; UN Doc E/CN.4/SR 377-9.

11 ECOSOC Resolution 303 I (XI), 9 August 1950, 11 UN ESCOR Resolutions Supp No 1, 29 (1950).

12 MCR Craven, *op cit*, 18.

13 GA Resolution 421(V), 4 December 1950; 5 UN GAOR Resolutions Supp No 20, 42 (1950).

14 *Ibid.*

these rights in a separate section of the draft Covenant and foreshadowed the application of a particularised obligations clause.[15]

Given the intransigence of the Commission on Human Rights and continued pressure for two Covenants, the ECOSOC referred the issue back to the General Assembly with a request for reconsideration.[16] After an extensive debate in the Third Committee of the General Assembly, the Third Committee reached the conclusion that the Commission on Human Rights should draft two Covenants.[17] On 5 February 1952, by a vote of 29 to 25 (with four abstentions), the General Assembly endorsed this decision.[18]

The substance of the economic and social rights to be included in what was to become the ICESCR was not debated in each session of the Commission on Human Rights or General Assembly. Initial discussions on the content of the rights were carried out in 1951-2. The rights formulated at this time were adopted with very little alteration in the final text submitted by the Commission on Human Rights to the General Assembly prior to the Ninth Session of the General Assembly in 1954. They were not subject to detailed debate again until Sessions held in 1956, 1957 and again in 1962. By the end of the 17th Session of the General Assembly in 1962, the Third Committee had an approved text for the rights of the ICESCR and subject to minimal alterations in 1965, the text of rights was adopted by the General Assembly in 1966.[19]

I. Evatt Period

During the late 1940s, Australia was in the forefront of efforts to recognise and protect economic and social rights. Despite facing external opposition from traditional allies such as the United Kingdom and the United States and some degree of internal dissension, Australian officials attending the Commission on Human Rights spoke

15 UN Document E/1992, 13 UN ESCOR Resolutions Supp No 9, 1952.
16 ECOSOC Resolution 384 (XIII), 29 August 1951, 13 UN ESCOR Resolutions Supp No 1, 35 (1951).
17 UN Doc A/C.3/L.184/Rev 1 (1951).
18 GA Resolution 543 (VI), 5 February 1952, 6 UN GAOR Resolutions Supp No 20, 36 (1952).
19 GA Resolution 2200 (XXI), 16 December 1966, 21 UN GAOR Resolutions Supp No 16, 49 (1966).

frequently and firmly on the topic of the importance of drafting internationally enforceable economic and social rights. Preferred lists of economic and social rights, including work, education and social security related rights, were submitted to the Commission on Human Rights for its consideration. Property related rights and women's economic rights were resisted. Notwithstanding these limitations, the period is marked by a belief that an essential part of government's role was to protect the economic interests of individuals and be accountable to both the individual and the international society in the fulfilment of that role.

(i) Attitudes Towards Economic and Social Rights

As noted previously, the inclusion of economic and social rights was relatively uncontroversial in the UDHR. Australian delegates reported back to the Department of External Affairs that '[e]veryone thought that economic and social principles should be written into the declaration'.[20] Partly as a result of the level of consensus on the topic, and partly as a result of Australia's primary representation being on sub-committees dealing with the implementation of rights,[21] Australian representatives had a low profile in the debates on the economic and social rights included in the UDHR. From the few statements made, it is apparent that Australia gave its unqualified support to the inclusion of economic and social rights alongside civil and political rights and was desirous that the international community would develop strong means of international enforcement for such rights.

On the occasion of the General Assembly's adoption of the UDHR, the Australian delegate, Alan Watt, spoke at length of his State's interest in economic and social

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20 Cablegram from Australian Delegation to the UN to the DEA, 12/5/48, in NAA A 1838/278, Item 856/13 Pt 3. The reasoning given by the delegation for this uniformity was the UDHR's status as a non-binding Declaration.

21 Australia elected to have primary representation on the Commission on Human Rights' Working Group on Implementation rather than the Working Group on the UDHR or the Working Group on the Covenant. It attended sessions of the other Working Groups as an Observer and was a direct participant in debates only on the plenary sessions of the commission and General Assembly in relation to the UDHR.

rights. Indeed, Watt devoted half of his speech to underlining the need for sturdy international protections for economic and social rights. Economic and social rights were justified on the basis both of their inherent utility to individuals and their interdependence with civil and political rights. The strength of the speech makes it worthy of lengthy quotation:

> I should like to express satisfaction with the inclusion of economic and social rights and also the unanimous agreement that such rights should be included. Modern economic and industrial arrangements have brought with them terrible social risks. I mention only mass unemployment and other loss of livelihood, whether through old age or other causes. My government has continually urged, in international conferences, that full employment, or in the language of the Declaration, 'the right to work' and social security must be guaranteed for world prosperity and world peace. We know what economic insecurity can breed. The civil and legal rights of the Weimar Republic were destroyed in the collapse of the German economy and the rise of Nazism.
>
> In speaking of the economic and social rights I do not underestimate the longer established rights. If we needed any conviction, the events of Nazism and the war have illuminated that traditional human liberties must be cherished. We know that economic rights are realised through the exercise of political liberties and that the surrender of these liberties can bring helplessness and insecurity.
>
> It is the task of social democracy to maintain and develop to the full the simultaneous enjoyment of political and civil liberties and economic rights. The comprehensive nature of the Declaration makes it an historic document in the progress of social democracy.[22]

The emphasis on governments' responsibility to take concrete steps to realise economic and social rights was equally evident in the Australian proposal that the UDHR explicitly recognise governments' responsibilities to implement economic and social rights in the text of the UDHR. An impasse had been reached as between the Soviet Union (which supported the inclusion of obligations clauses for each economic and social right) and the United States and United Kingdom (which strenuously opposed such inclusions). Australia, together with Belgium and France, argued in favour of the insertion of a general prefatory clause to 'give recognition to present day feeling that individuals, as members of organised society, are entitled to economic and social security' and to affirm that rights should be affected through positive measures.[23] The result was the adoption of Article 22 of the UDHR:

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation

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22 Speaker's Notes on the Report of the Commission on Human Rights, undated but circa November 1948, 'UN Charter' Folder, Evatt Collection, Flinders University.

23 Report of the Australian Representative to the Third Session of the Commission of Human Rights, in NAA A 1838/278, Item 856/13 Pt 3.

> and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Fuller expositions of the Australian position took place in the heated debates concerning inclusion of economic and social rights in the Covenant on Human Rights. Throughout the discussions in the Commission on Human Rights and the General Assembly in the 1947-1949 period, Australia's position remained constant. One Covenant giving equal recognition to all forms of rights was needed. In May 1948, in the Drafting Committee of the Commission on Human Rights, for instance, the Australian delegate dismissed as 'misconceived' fears that the drafting of a single Covenant would limit State signatures to the Covenant. The Covenant, it was said, should represent a guarantee of rights of most concern to the common man. It should not be drawn up merely on the basis of the denial of rights under Nazi persecution,[24] but should extend to the rights expected by individuals. Freedom from want, to take one example, had been widely accepted in the world.[25] If economic and social rights were omitted, the Australian delegate warned, the common man would regard the Covenant as a purely academic document. While conceding that specialised agencies had an important role to play in monitoring and assisting the implementation of economic and social rights, there remained a need to finalise a Covenant on such rights.[26]

In 1949, when presenting a list of 'basic rights' for the Commission on Human Rights' consideration,[27] the Australian representative delivered an impassioned speech, again emphasising the interconnectedness of all forms of rights:.

> The question that we have to answer now is whether this development towards the idea of the social service state, and the rights of individuals therein, has reached the stage where the protection of the State in many circumstances is the duty of the State and the right of the individual. It is the view of the Australian Government that we have

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24 EJR Heyward, Australian representative, UN Doc.E/CN.4/AC.1/SR 29, 2; 4 December 1947. In this thesis the terms 'representative' and 'delegate' are used interchangeably. During the negotiations, personnel were appointed as either Representatives, Alternates and Delegations. The choice to use more generic references (other than in verbatim citations) was made in order to focus attention on the substance of comments rather than the individual's official position.

25 *Ibid.*

26 *Ibid.* The delegate specifically rejected the example of work done by the International Labour Organisation. He pointed out that the International Labour Organisations's Convention on Forced Labour had not prevented the drafting of an article prohibiting forced labour in the Covenant on Human Rights.

27 These basic rights are considered below, 40-41.

> reached that stage, and that the significant moment in the recognition of this fact was when the battle over Article 55 of the Charter was finally decided at San Francisco...
>
> Civil rights are themselves the means to an end --a full and decent life. Without economic and social rights hand in hand with them they are largely meaningless. Without education man will not properly comprehend or enjoy his rights. Without work he will degenerate. Without protection in times of sickness and other hardship his life, and that of his family may easily be ruined. We believe that the world has developed sufficiently for the realisation of these truths to be spelled out as rights of men in the Covenant of Human Rights. Man has, in other words, reached the stage where he has the right to expect from the community all measures necessary to establish the minimum for decent life, or the right to the opportunity for decent life.' [28]

In this speech, the Australian delegate also sought to legitimise economic and social rights through a reference to State's existing international obligations under the United Nations Charter ('the Charter'). Article 55 of the Charter, to which specific reference was made, was the 'Full Employment' clause. It obliged States to take steps towards the attainment of full employment policies. In mentioning Article 55, the delegate was repeating the refrain of Evatt – States had committed themselves to fulfiling economic responsibilities.[29]

On the international stage, Australia spoke with one voice. Behind the scenes, there was less consensus with particular criticism of economic and social rights emanating from the Department of Labour and National Service and some ranks of the Department of External Affairs.

The Secretary of the Department of Labour and National Service, William Funnell was pessimistic about the feasibility and utility of economic rights. In commenting upon the inclusion of labour rights in the draft Universal Declaration of Human Rights, Funnell stated:

> My general feeling is that the inclusion of articles on labour rights adds nothing either to the document or to the protection of fundamental labour rights. In a Declaration of this sort, which attempts to cover the whole field of human rights, any particular aspects must be so vaguely worded as to be

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28 Speech on Economic and Social Rights, included as Annex to Report of the Australian Delegate of the Fifth Session of the Human Rights Commission, 1949, undated, in NAA A 1838/1, Item 856/13/7 Pt 4, Speech given on 16 June 1949 by KCO Shann, Australian representative, UN Doc E/CN.4/SR 131, 3.

29 As to Evatt's championing of the significance of Article 55 of the Charter, see WJ Hudson, *Australia and the New World Order: Evatt at San Francisco, 1945*, Australian Foreign Policy Papers, ANU, 1993, Chapter 10; See also references in fn 77.

> completely useless either as protection or as gaining the approval by nations of policies in line with those rights, especially in the case of labour matters where there is a specialist body in the field able to produce international regulations after more precise study. The attempt to incorporate odds and ends of labour rights in a document on human rights in general, seems particularly futile.[30]

In a later letter reiterating his concerns, Funnell warned that the establishment of an international regime for economic and social rights might create a situation in which legal sanctions outstripped the moral acceptance of the rights.[31] As a practical matter, he questioned whether there would be an appropriate international body to oversee implementation of the rights. While agreeing that the International Labour Organisation was the obvious choice to fulfil such a role, Funnell considered that it would be unwilling 'given the world context'.[32] As a result, Funnell concluded that economic and social rights should be left out of the scope of the Covenant 'despite my full agreement, in principle, with the Soviet contention that a document which purports to safeguard basic rights but fails to safeguard individual's economic position, is unrealistic'.[33]

At first glance, the hostility of the Department of Labour and National Service to the drafting of economic rights is perplexing. The Department of Labour and National Service had been closely involved with the development of economic rights in the context of International Labour Organisation Conventions and Recommendations. It is this involvement, however, which offers a possible explanation for the hostility. Given that dealing with the International Labour Organisation was an exclusive function of the Department of Labour and National Service, Funnell's stated preference for leaving the development of economic rights to the International Labour Organisation carries with it a strong message of territoriality.

Within the Australian Mission to the United Nations, there was additional disquiet as to whether Australia should maintain support for the inclusion of economic and social rights. In a memorandum prepared in June 1948, the Mission noted the existence of

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30 Memorandum of W Funnell, Secretary of Department of Labour and National Service to the Secretary, DEA, 8/4/48, in NAA A 1838/1, Item 856/13/7 Pt 1.

31 Letter of W Funnell, Secretary, Department of Labour and National Service, to the Secretary, DEA, 26/7/48, in NAA A 1838/1, 856/13/7 Pt 3.

32 *Ibid.*

33 *Ibid.*

disagreement internally and within the United Nations community on the question.[34] The arguments advanced militating against protection of economic and social rights related to their distinct nature in being resource intensive (for the State), incremental in form, and difficult to apply in countries with under-developed economies. After presenting the major arguments for and against and proposing basic rights, the Mission concluded that Australia might reconsider its policy of support for economic and social rights 'in the light of the arguments being used'.[35]

Australia's stance certainly provoked strong reactions from traditional allies such as the United States and the United Kingdom. The United States representatives had discussed with the Australians their objections to the recognition of economic and social rights. Pragmatically, they argued that the United States' executive would have difficulties in convincing Congress to pass the Covenant if it included economic rights. Furthermore, as a matter of principle, the United States considered that economic rights would require too great State control and necessitate the development of different international machinery from that envisaged for civil and political rights.[36] Australian delegates evinced little sympathy for either argument. In discussions with their United States counterparts, the Australians suggested that perceived difficulties associated with implementation were overstated. Any constitutional difficulties could be overcome by the inclusion of an appropriately worded federal-state clause in the Covenant. Privately, the Australian Mission to the United Nations were hopeful that the United States might eventually resile from its hostile stance given that the need for strong implementation mechanisms applied equally to the realisation of civil rights in the southern states of the United States.[37] Of greater concern to Mission staff was the implacable opposition of the United Kingdom. In the Commission on Human Rights, the United Kingdom characterised economic and social rights as non-legal. The United Kingdom undertook

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34 Letter from Australian Mission to the UN to the Secretary, DEA, 11/6/48, in NAA A 1838/1, Item 856/13/7 Pt 3.

35 *Ibid.*

36 Memorandum from the Secretary, DEA to HFE Whitlam, 26/5/48, in NAA A 1838/278, Item 856/13 Pt 3.

37 *Ibid.* The Mission did not elaborate on this point, but the reference seems to have been to the need to overcome racial segregation in the southern states of the United States.

further lobbying of Australia through the agency of Commonwealth relations. In an attempt to persuade Australia to abandon its support for one Covenant, the Secretary of State for Dominion Affairs in London reported its view to Australia that cultural and economic rights cannot 'in their nature' be defined in the form of legal obligations for the State.[38] Although Australia did not respond any more favourably to the pleas of the United Kingdom than to the United States, the Australian Mission to the United Nations may well have been influenced by such representations to encourage a 'reconsideration' of policy. Notwithstanding this pressure, however, Australia remained publicly in favour of the inclusion of economic and social rights in the human rights Covenant. Unwavering support, though, did not translate into unswerving support for all economic and social rights advanced in the negotiations.

(ii) Attitudes towards the Substance of Economic and Social Rights

Evidence of Australia's responses to the economic and social rights included in the UDHR is limited to Australia's contributions during the plenary sessions of the Commission on Human Rights and the 1948 Sessions of the Third Committee of the General Assembly preceding the UDHR's adoption. The overwhelming impression gained from Australia's public comments is that Australia welcomed the economic and social rights included in the UDHR.[39] Only four draft clauses concerned the Australian delegation. The first two clauses related to trade unions, the third to remuneration of work, and the fourth dealt with the right to property. In at least two of these four cases, it could be argued that the basis of Australia's resistance was the Labor Party's desire not to affect existing industrial practices.

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38 Cablegram from the Secretary of State for Dominion Affairs, London, to DEA, 12/6/47, in NAA A 1838/278, Item, 856/13/2.

39 Johannes Morsink has noted that Australia was at first opposed to the inclusion of detailed rights: J Morsink, *The Universal Declaration of Human Rights*, *op cit*, 223. On a closer reading of the documentation, however, Australia was not opposing the inclusion of rights, but suggesting that a shorter version of rights might be used in the UDHR and a more detailed elaboration in the binding Covenant: see UN Doc E/CN.4/AC.1/SR 9, 10; 18 June 1947 per Ralph Harry.

Australia, together with New Zealand, objected to two clauses that were seen as potentially interfering with current trade union and labor practices: Article 20(2) and Article 23(4). Article 20(2) included the statement that 'No one may be compelled to belong to an association' whilst Article 23(4) declared that everyone was 'free to form and to join trade unions'. Australia and New Zealand were concerned to protect States' abilities to institute 'closed shop' practices, by virtue of which employers could limit the pool of employees to union members. Such practices were legislatively endorsed in most Australian states in the late 1940s. Whilst not wanting to have the international community endorse compulsory unionism *per se*, Australia and New Zealand wished to leave the choice of such a system open to individual States. Two strategies were employed. First, Australia and New Zealand recorded their views that trade unionism was dealt with in only (the equivalent of) Article 23 and abstained on the vote on Article 20(2).[40] Secondly, Australia supported a New Zealand amendment that proposed substitution of the formulation that everyone has the 'right' to form and join trade unions for the previous formulation ('everyone is free to form and to join trade unions').[41] It was hoped that by the deletion of the word 'free', any implication that an individual should be able to assert a right in employment *not* to join a trade union would also disappear. Australian delegates were also concerned to avoid any implication that an individual could choose to form his/her own trade union[42] and undermine the system of centralised unions, which in turn would lead to the possible overwhelming of the arbitration system as such smaller unions sought a right of hearing before the Arbitration Commission.[43]

The second aspect of the UDHR that received particular attention from Australia was that relating to the means of determining a worker's remuneration in Article 23.

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40 Cablegram from the Delegation to the United Nations Organisation, Paris to DEA, 27/11/48, NAA A 1838/1, Item 856/13 Pt 5.

41 Report on the Universal Declaration of Human Rights by the Australian Representative to the Third Committee, undated, in NAA A 518/1, Item 104/5/2 Pt 1.

42 Sir Frederick Eggleston also warned the Department that unions might be formed by persons having different views to the general trade unions – eg company unions: Synopsis of paper by Eggleston, prepared in the DEA for inclusion in the draft Brief by A Loomes, 28/7/48, in NAA A 1838/1, Item 856/13 Pt 5.

43 A Watt, Australian representative, UN Doc A/C.3/SR 140, 530; 16 November 1948.

According to the Australian delegation, a 'man's remuneration' might need to cover not only personal needs, but also those of the family.[44] In putting forward this argument, the Australian delegation was defending the structure of the 'basic wage' mechanism in use in Australia. When the text of Article 23(3) was adopted, the Australian delegation reiterated its opinion that the question remained open whether 'a man's salary or wages should cover the needs of himself and his family' or whether such family needs should be covered 'by other means of social protection'.[45] The use of gender specific language by the Australian delegation was not merely a reflection of the language of the UDHR. The Australian delegation was also wary about an immediately enforceable obligation to provide equal pay for women.[46] In taking into account the potential family responsibilities for men, the Australian award system entrenched a system whereby the standard wage for a woman was less than that for the single man, with adjustments for family responsibilities only made for married men. In recognition of the perceived inability of the current system to provide equal pay for women, Australia had been resisting the freestanding recognition of a right to equal pay in relevant international fora such as the International Labour Organisation.[47]

Recognition of the right to property (Article 17(1) UDHR) also prompted adverse comment by the Australian delegation. Ralph Harry, the Australian representative present when the right was discussed in the Sub-Committee of the Commission on Human Rights, echoed comments of the United Kingdom and Chilean representatives

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44 A Watt, Australian representative, UN Doc A/C.3/SR 156, 676; 25 November 1948.

45 Report on the Universal Declaration of Human Rights by the Australian Representative to the Third Committee, in NAA A 518/1; Item 104/5/2 Pt 1. A copy can also be located in NAA A 1838/1, Item 852/17/3/6 Pt 2.

46 Australia objected to a specific reference to non-discrimination within the context of the right to work on the basis that it narrowed the potential operation of Article 2 (the general non-discrimination clause) of the UDHR. When a Cablegram was sent from the Mission to the Department of External Affairs explaining this conduct, the equal pay clause was underlined and a question-mark noted against it: Cablegram from the Australian Delegation to the United Nations, Paris to the DEA, 18/11/48, NAA A 1838/1, 856/13 Pt 5. Australia's reluctance to endorse a guarantee of equal pay for women was more apparent in the debates on the Covenant, as discussed later on in this Chapter.

47 Australia had supported reference to the principle of equality in the preamble to the ILO Constitution, but had urged that the issue of the implementation of an equal pay guarantee be subject to further study by the ILO: reported in letter of W Funnell, to the Secretary, DEA, 8/8/48. The concern with respect to the Commonwealth's ability to implement the provision was shared by the Attorney-General's Department: see in NAA A 432, Item 54/3779 Pt 6.

that property was subject to extensive governmental control and could not be considered a fundamental human right.[48] An internal memorandum from July 1948, reflecting on Australia's previous abstention on the inclusion of a right to property in the UDHR, considered that the abstention may also have been motivated by an awareness of the difficulties that would arise for States who practised an advanced form of socialisation.[49] The author of that memorandum, Allan Loomes, provided this historical account in the context of arguing that Australia might conceivably support a right of protection against property acquired without adequate compensation.[50] His proposal did not receive the endorsement of his departmental or political superiors.

Australia had a more detailed involvement with the drafting of the economic and social rights to be included in the Covenant on Human Rights. The initial Australian stance was to argue that *all* the rights included in the UDHR should be recognised in the draft Covenant. After failing in this proposal (and internally conceding that this proposal had been 'unrealistic'),[51] one of the staff of the Australian Mission to the United Nations, Eric Heyward drafted six 'basic rights'. After some pruning by officials within the Department of External Affairs,[52] these six rights were submitted to the Fifth Session of the Commission on Human Rights. They read:

> 1. Every person shall have the right to work, and each State shall take such measures as may be within its power to ensure that all persons ordinarily resident in its territory have an opportunity for useful work.[53]
> 2. In order to ensure fair and reasonable wages and working conditions, in occupations where wages and conditions are not determined by collective bargaining, or

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48 RL Harry, UN Doc E/CN.4/AC.1/SR 13, 18; 9 June 1947.

49 Internal Memorandum, signed by A Loomes, to the Secretary, DEA, 9/7/48, NAA A 1838/278, Item 856/13 Pt 3. Note though that Loomes saw some benefit in the provision dealing with 'arbitrary deprivation of property'. This was later to be the focus of Australia's hostility towards the clause.

50 *Ibid.*

51 Minute from TG Glasheen to AH Tange, 27/5/49, in NAA A1838/1, Item 856/13/2/1.

52 Australian Representative to the Third Session of the Commission on Human Rights, quoted in Memorandum from the A/g Secretary, DEA to the Australian Mission to the UN, 28/4/49, asking the Minister for policy rulings, in NAA A 1838/1, Item 856/13/7 Pt 3. Terence Glasheen of the Mission noted that it was not possible to obtain a ruling from Evatt (who had left New York), but that the Mission proceeded with submitting the rights: Minute from TG Glasheen to AH Tange, 27/5/49, NAA A 1838/1, Item 856/13/2/1. There is no evidence though, when subsequently briefed that Evatt disagreed with the substance of the rights.

53 With respect to the right to work, the Australian delegation were instructed to bear in mind the 'consistent desire of Government to include full employment obligations in international organizations' with specific reference made to the ITO[sic] Charter and the UN Charter: Cablegram from DEA to Delegation, 30/5/49, in NAA A 1838/1, Item 856/13/7 Pt 3.

other arrangements are not available against exceptionally low wages, the State shall establish and maintain machinery for fixing minimum wages and conditions.
3. Everyone shall have the right to social security through medical care and to safeguards against absence of livelihood through unemployment, illness or disability, old age, or other reasons beyond his control.
4. Each State shall ensure by law that there shall be reasonable limitations on working hours.
5. Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be equally accessible to all on the basis of merit.
6. No one shall be deprived of his nationality by way of punishment [arbitrarily] or denied the right to change his nationality.

In submitting these rights to the Commission on Human Rights, the Australian delegate made a lengthy speech explaining each right. States were reminded of their pre-existing international commitments, particularly with respect to economic and social rights. The rights were justified not in terms of economic sense or organisation but in terms of the expectation of the individual. In relation to the right to social security, for instance, it was stated that the right of the human was to 'expect the organization of which he is a part, ie the State, to save him from degradation'. Similarly in relation to the right to work, work was said to be only the means to the end of a good life for the individual and that the State had a duty to see that the 'means does not harmfully distort the end'.[54]

The rights chosen as 'basic' and the reasoning provided in Heyward's initial memorandum attaching the six rights are significant for a variety of reasons. First, the clauses were drafted so as to create explicitly legal content. Heyward explained that statements regarded as 'aspirational' or 'unobtainable' had been avoided. Thus he rejected the clause that 'every person has the right to receive pay commensurate with his ability and skill and to work under just and favourable conditions' on the basis of its vagueness. A State guarantee against loss of livelihood was also rejected on the basis that the State could not necessarily compensate for the full extent of loss. In its focus on what a State could be held to provide, the Australian proposal reflected an understanding that economic and social rights were legal rights or entitlements. At the

[54] Statement on Economic and Social Rights Made by the representative of Australia, undated, in NAA A 1838/1, Item 856/13/7 Pt 4. A summarised version is recorded at UN Doc E/CN.4/SR 131, 3; 16 June 1949.

same time, Heyward implicitly saw his role as creating rights, rather than recognising pre-existing rights. It was thus a conceptualisation that could accommodate the shaping of rights so as to avoid political embarrassment on issues of sensitivity such as equal pay for women.

Secondly, the progressive versions of the draft rights display an interest in the notion that economic and social rights should bind not only the State but also more generally the community. Heyward originally drafted an article on 'education' that read in part: 'there shall be equal access to higher education as can be provided by the State or community on the basis of merit.'[55] The intended meaning of this clause is unclear. One possible interpretation is that by referring to equal access to community education, Heyward was advancing the view that not only States, but persons within the community would be bound under the Covenants to respect human rights. If it was intended to operate in this broader fashion, it was to be a brief dalliance with such a notion. The reference to equal access to community education was removed in the re-drafting process undertaken at the Departmental level.

Thirdly, Heyward in his correspondence with the Department of External Affairs anticipated that the content of economic and social rights might be variable depending on the economic and cultural context in which rights were implemented. Heyward referred to resistance by countries such as Lebanon and the United Kingdom (in relation to its non-self-governing territories). Such resistance was interpreted as relating to the concern that economies that were in the agriculture and handicraft stage could not support the higher standard of living required by economic and social rights. In rebutting this concern, the delegation argued 'lacking a highly specialised economy, these countries have not the same need for a guarantee of economic and social rights,

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[55] Letter of EJR Heyward for the Minister of the Australian Mission to the United Nations, to the Secretary, DEA, 11/6/48, in NAA A 1838/1, Item 856/13/7 Pt 3. A similar comment was made by Ralph Harry, as Australian representative in debates on the UDHR: UN Doc E/CN.4/SR 14, 11; 3 July 1947.

and the rights they do need would be rather different.'[56] Implicit in this analysis, was the belief that the content of economic and social rights could vary according to the stage of development of the economy and country. Heyward went on to further elucidate his point: 'For example, a guarantee against distribution from crop failure or against extortion by landlords and money-lenders would mean more than a guarantee of the right to work'.[57] That the Australian delegation adhered to a relativist position was further evidenced by the delegation's 1949 quotation of the words of Lauterpacht, that obligations are 'elastic and circumscribed by the internal conditions and the general economic development of the State.'[58]

Fourthly, the choice of which rights to include in a list of 'basic rights' is revealing. Not all the economic and social rights included in the UDHR were duplicated in the list of basic rights. No reference was made to a general right to an adequate standard of living. Despite the inclusion of such a right in the UDHR and its subsequent adoption in the ICESCR, the Australian proposal related only to social security. The omission did not receive detailed consideration in departmental papers. Equally, no explanation is given of the lack of any reference to a right to rest and leisure in the context of the right to work. More explicable is the continued opposition to the right to property and the right to equal pay. Perhaps ingenuously, the Australian delegate attempted to justify the absence of a reference to equal pay on the basis that the topic was being discussed by the International Labour Organisation.[59] The omission, however, seems to reflect ongoing concern that implementation was not possible in the current Australian context.

The absence of an equal pay provision underlines the fifth significance of the 'basic rights'. The choice of rights demonstrated a preference for the concerns of the 'working man'. Equivalent substantive concerns for women were ignored. In addition to the

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56 Letter of EJR Heyward for the Minister of the Australian Mission to the United Nations, to the Secretary, DEA, 11/6/48, in NAA A 1838/1, Item 856/13/7 Pt 3.

57 *Ibid.*

58 Excerpt from H Lauterpacht, *An International Bill of Rights*, in NAA A 1838/1, Item 856/13/7 Pt 3.

59 Statement on Economic and Social Rights Made by the representative of Australia, undated, in NAA A 1838/1, 856/13/7 Pt 4, a summarised version of which appears at UN Doc E/CN.4/SR 131, 3; 16 June 1949.

equal pay example, this proposition is confirmed by Heyward's explanation of the scope of the right to social security. After mentioning the breadth of situations in which the State obligation arose, specifically mentioning the contingencies of widowhood, death or incapacity of the breadwinner, and crop failures, Heyward stated that maternity benefits and child endowments were not encompassed by the provision.[60] The vision was thus limited in its universality.

The 'six rights' proposal was not discussed in any detail at the Fifth Session of the Commission on Human Rights.[61] Further consultations were held with Commonwealth departments in July 1949.[62] After this pivotal round of inter-departmental talks, Australia decided to withdraw two of its economic and social rights, namely the obligation on the State to restrict working hours (paragraph 4 quoted above) and the prohibition on withdrawing nationality as a punishment (paragraph 6 quoted above). According to the minutes of the inter-departmental committee, the feeling was that the obligation with respect to working hours might 'deprive persons of their freedom of action (particularly self-employed persons), and that in any case the protection of working conditions was sufficiently covered by paragraph 2 of the Australian proposals.[63] The nationality provision was withdrawn given that Australian legislation included the power to revoke citizenship and the distinction between nationality and citizenship remained hazy. It was thus thought more appropriate to leave the question of nationality to the ongoing examination of the International Labour Organisation.[64] Commitment remained firm, however to the inclusion of economic and social rights dealing with the right to work, the right to fair working conditions, the right to social security, and the right to education.[65]

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60 Letter of EJR Heyward for the Minister of the Australian Mission to the United Nations, to the Secretary, DEA, 11/6/48, in NAA A 1838/1, Item 856/13/7 Pt 3.

61 Submission to the Minister for External Affairs, 19/3/51, in NAA A 1838/1, Item 929/4/4 Pt 1.

62 Minutes of Inter-Departmental Meeting to Consider Text of Draft Covenant on Human Rights, Department of External Affairs, 12/13th September 1949, in NAA A 1838/278 , Item 856/13/7 Pt 5.

63 *Ibid.*

64 *Ibid.*

65 The inter-related question of Australia's attitude towards the implementation of economic and social rights is dealt with in Chapter 6.

Internal documents of the Department of External Affairs show an awareness of mounting international tensions. Yet this awareness seems to have had little impact on the development of policy with respect to economic and social rights. The Australian delegate to the Third Session of the Commission on Human Rights in May-June 1948, for instance, commented on the 'extremely uncompromising' language used by the Soviet representative, Professor Pavlov, in deriding the fact that economic and social rights had been left 'hanging in the air'.[66] The objections of the United States and the United Kingdom to the legal status of economic and social rights were also subject to scrutiny. Yet, neither Evatt nor Australian officials expressed any desire to mollify any of the superpowers. They viewed their role as pursuing a principled road, advocating Australia's vision of economic and social rights. At times they did perceive their stance as that of a 'middle road' – as noted previously in the discussion of Article 22 of the UDHR. However, in the majority of cases, Australian policy paid scant regard to the growing Cold War tensions.

Instead, the fact that despite internal and external hostility to economic and social rights, the Australian delegation persisted with its efforts seems due to the priority placed on economic and social rights by Evatt. Unfortunately, there are few written records of Evatt's instructions to delegates concerning economic and social rights, a matter consistent with Evatt's tendency to put very few instructions in writing.[67] Yet all of the important policy documents were marked for Evatt's attention and there is evidence that departmental staff noted where it had not been possible to clear the submission through Evatt. None of the submissions on inclusion of economic and social rights are so marked,[68] giving the impression that Evatt gave his approval to Australia's public stance. Furthermore, it seems unlikely, in the face of significant pressure from allies and internal dissidents, that Department of External Affairs officials would choose to act without Ministerial authority. That Evatt assumed primary

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66 Report of the Australian Representative to the Third Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13 Pt 5.

67 See Introduction, fn 42.

68 The only exception is the initial submission concerning the submission of the six basic rights: Minute from TG Glasheen to AH Tange, 27/5/49, NAA A 1838/1, 856/13/2/1.

responsibility for matters within his portfolio is also consistent with anecdotal evidence of Evatt's tendency to act independently of staff or other Ministers.[69]

Whilst Evatt seems to have been the primary author of Australia's stance, the policies adopted bear the hallmark of the social democratic policies of the Australian Labor Party. For Evatt and his Labor colleagues, the immediate post-war years offered the challenge and opportunity to reconstruct society on a more just basis. Employment was a particular focus. Large scale government intervention to achieve full employment was desirable. Thus in 1945, the objective of full employment was added to the Federal Labor Platform, to sit alongside its traditional commitment to socialism. Labor proclaimed its commitment to the 'planning and regulation of all factors of economic life' in order to achieve full employment and guarantee economic security.[70] The Minister for Post-War Reconstruction, JJ Dedman, announced the government's Charter for ExServicemen, defining the national policy as full employment, high and rising standards of living, the completion of a comprehensive social security programme, the rapid development of national resources and the adequate provision for political and military defence.[71] A White Paper was produced on full employment in Australia premised on governmental responsibility to 'provide the general framework of a full employment economy, within which the operations of individuals and businesses can be carried on'.[72]

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69 Alan Watt, for instance, has commented that Evatt 'did not want a Department organised to formulate, under his direction and control, a broad policy for submission to him to approve, modify or reject, but rather a Department organised to carry out his own pre-determined policy': A Watt, 'Australian Diplomatic Service: 1935-1965' in G Greenwood, N Harper (eds), *Australia in World Affairs: 1961-65*, FW Cheshire, Melbourne, 1968, 143.

70 Quoted in K Tennant, *Evatt: Politics and Justice*, Angus and Robertson, Sydney, 1972, 156. See too B McKinlay, *The ALP: A Short History of the Australian Labor Party*, Drummond, Melbourne, 1981.

71 Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 23 March 1945, Vol 181, 873-4.

72 Commonwealth Parliamentary Papers, 1945-6, Vol IV, 1195. The Labor Party's pre-occupation with full employment also needs to be understood against the background that in the immediate post-war period, Australia needed to find employment for 150 000 ex-service personnel in a normal working population of 3 000 000: K Tennant, *op cit*, 162. Ensuring employment was a preoccupation crossing party lines: see As for the more general pre-occupation with employment prospects in the post world context, see *The Argus*, Melbourne, 15 September 1945 (Weekend Magazine), quoted in FK Crowley, *Modern Australia in Documents, Vol 2: 1939-70*, Wren Publishing, Melbourne, 1973, 131.

Viewing the task of reconstruction through Labor's ideological lenses, Evatt's approach was to empower governments to institute remedial policies.[73] Within the context of this post-war planning, Evatt saw his role as facilitating the international and domestic legal environment that would support such government obligations and interventions. As Attorney-General, Evatt proposed constitutional changes to give greater power to the Commonwealth to legislate with respect to economic matters in 1944 and 1947.[74] As Minister for External Affairs, Evatt focused, in part, on gaining broad international recognition of States' economic responsibilities to bolster international cooperation and to bolster programmes instituted in individual States.

Evatt's vision for international economic rights was apparent in the public speeches he made even before the Commission on Human Rights commenced its task. In applauding the Atlantic Charter entered into between United States President Roosevelt and United Kingdom Prime Minister Churchill, for instance, Evatt emphasised the 'declared international objective clause ... of securing "improved labour standards, economic advancement, and social security"'.[75] Peace itself would be meaningful only if it was based on 'social justice and economic betterment'.[76] According to Evatt, the means of guaranteeing social justice was to recognise the responsibility on States to engineer such change. It was a stance carried through in Evatt's insistence that

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73 Commentators have criticised Evatt's policies as being aimed merely to increase Commonwealth power: see G Sawer, 'The United Nations', in G Greenwood and N Harper, *Australia in World Affairs*, Vol 1 (1950-5), Cheshire, Melbourne, 1957, 97. Whilst not denying that this may have been part of Evatt's motivation, it fails to give credit to Evatt's desire to obtain power to achieve certain ends.

74 The referendum in 1944 concerned the government's proposal that the Commonwealth should be empowered for five years after the war to make laws for inter alia employment and unemployment, production and distribution of goods with the approval of the States and national health with the consent of the State. A further referendum was held in 1947 concerning, inter alia, the government's proposal to give the Commonwealth power over rents. Both referenda failed. An excellent summary of the results of referenda held in Australia is contained in T Blackshield, G Williams, B Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials*, Federation Press, Sydney, 1996, 964-970.

75 Ministerial Statement by Dr Evatt in the House of Representatives, 19 July 1944, reproduced in HV Evatt, *Foreign Policy of Australia: Speeches*, Angus and Robertson, Sydney, 1945, 194

76 Statement before the Plenary Session of Conference of Paris by the Australian Minister for External Affairs, Evatt, 31 July 1946, in 'War - Paris Peace Conference 1945-6' Folder, Evatt Collection, Flinders University.

Australian representatives advocate for a 'full employment pledge' at the Bretton Woods conference (leading to the establishment of the International Monetary Fund), the 1944 Philadelphia Conference of the International Labour Organisation and in his personal advocacy for a full employment pledge at the San Francisco Conference leading to the establishment of the United Nations.[77] Whether or not Evatt played a central role in the United Nations' adoption of Article 55 of the UN Charter, a matter disputed by commentators, Evatt saw Article 55 as one of the two 'most significant achievements at the United Nations Conference'.[78] It was regarded as significant since it entrenched the responsibility of the international community and of individual States to actively pursue economically interventionist policies.

Supporting the inclusion of economic and social rights in the draft Covenant on Human Rights was thus a continuation of Evatt's belief that States needed to accept obligations to intervene in the market force to guarantee the wellbeing of its population, in particular to protect the 'working man'. He presupposed the legitimacy of a welfare State and focused upon the fundamental needs of individuals rather than the burden on States. For Evatt, international human rights obligations were accepted as a means of defining the 'servile' role of the State – that is, the State's obligation to serve individuals.

II. Spender Period

The real watershed in Australia's attitude to economic and social rights came after the Liberal-Country Party Coalition 's electoral victory in 1949. Under the direction of

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77 As to this stance, see W J Husdon, *Australia and the New World Order: Evatt, San Francisco, 1945*, Australian Foreign Policy Papers, ANU, 1993, Ch 10; JDE Plant, *The Origins and Development of Australia's Policy and Posture, the UN Conference on International Organization, San Francisco, 1945*, PhD Thesis, ANU, 1967, 192-203; Report on United Nations Conference on International Organization, 'United Nations – Conference on International Organization, San Francisco, 1945' Folder, Evatt Collection, Flinders University.

78 The other significant achievement he noted was the breadth of the powers of the General Assembly. Report on United Nations Conference on International Organization, 'United Nations – Conference on International Organization, San Francisco, 1945' Folder, Evatt Collection, Flinders University.

Percy Spender, the inaugural Minister for External Affairs of the Liberal Party,[79] Australia moved slowly away from an insistence on the equality of economic and social rights with civil and political rights. Spender inserted into Australian policy an emphasis on correlative rights and duties. The perceived role for the State in guaranteeing economic rights was reduced. Individual action was to be the primary agent for change, an emphasis that owed more to Liberal Party philosophy than Cold War hostilities.

(i) Attitudes Towards Economic and Social Rights

At an international level, the issue that dominated discussions of the Commission on Human Rights during the short period of Spender's Ministry, wastefully so according to Australia's representative,[80] was the issue of one or two Covenants.

In the midst of the 1950-51 debates, Australia's stance was marked by apparent indifference. In early 1950, Arthur Tange wrote to the Australian representative in the United Kingdom on behalf of the Secretary of the Department of External Affairs. He informed the representative that Australia would continue to support the inclusion of economic and social rights, but that Australia would not press for the drafting of one Covenant if the proposal lacked majority support. Australia's contingency plan was to support the United States proposal that rights be included in separate, detailed Covenant or have additional articles incorporated in a later separate protocol.[81] In public, Australia's position moved to abstaining on crucial votes. In 1950 in the General Assembly, for instance, the Australian delegate emphasised that while the Australian delegation 'stood, and always had stood' for one Covenant, it considered it to be in the interests of fairness to permit those proposing separate Covenants to 'have the fullest

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79 The Liberal Party was only founded during 1944-45, see I Hancock, *National and Permanent? The Federal Organisation of the Liberal Party of Australia: 1944-1965*, Melbourne University Press, Melbourne, 2000, 37-38.

80 Report of the Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 2A.

81 Letter from AH Tange, for the Secretary DEA to External Affairs Officer, Australia House, London, 22/3/50, in NAA A 1838/1, Item 856/13 Pt 5.

opportunity to test the feeling of the Commission'. It would therefore abstain.[82] Such action was in keeping with the Department of External Affair's view that Australia should adopt a neutral position and accept the Commission's superior position to determine its working priorities.[83]

Following the General Assembly Resolution in favour of one covenant in late 1950, the Department of External Affairs advised the Minister that Australia should continue cooperating in efforts to draft the economic and social rights, notwithstanding the continued protests by the United States and the United Kingdom and despite their view that 'the chances of ever preparing a Covenant which will prove acceptable to any number of states have been made even slimmer by the decision of the General Assembly and by heightening international tension.'[84] Spender authorised the delegation to leave the Commission free to take up its task of continued drafting in 1951 'without being hedged in by Assembly directions'.[85] Spender was thus prepared to allow the Commission to continue its concentration on civil and political rights.

Shifts in relation to the one/two Covenant issue appear to have been the result of recommendations made by the Department of External Affairs which were endorsed by Spender. The Australian Mission to the United Nations had recommended to the Department of External Affairs in early 1950 that the new Minister reconsider Australia's support for economic and social rights given the lack of support generally for economic and social rights amongst other delegations.[86] Although the Department of External Affairs initially did not agree with this recommendation,[87] by late 1950, the

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82 'Inclusion of Economic, Social and Cultural Rights in the Covenant', undated report, in NAA A 1838/1, Item 856/13/10/6 Pt 3.

83 Submission to the Minister for External Affairs, 22/9/50, excerpted in Letter from the Australian Mission to the United Nations to the Secretary, DEA, 29/9/50, in NAA A 432/20, Item 54/3779 Pt 5.

84 Submission to Minister for External Affairs, annotated by Percy Spender, 12/3/50, in NAA A 1838/1, Item 895/3/12.

85 Submission to Minister for External Affairs, annotated by Percy Spender, 24/10/50, in NAA A 1838/1, Item 856/13 Pt 10.

86 Memorandum from Australian Mission to the UN, to the Secretary, DEA, 2/3/50, in NAA A 1838/1, Item 856/13 Pt 8.

87 *Ibid.*

Department was proposing that Australia soften its stance. The result was a 'policy of neutrality' by virtue of which Australia would neither press for the inclusion of economic and social rights in the Covenant, nor advocate for their exclusion.

Viewed against the background of policies adopted during the Evatt period, the shift to 'neutrality' was a significant move. The Australian State was indicating publicly that it did not place as high a priority on economic and social rights and was open to their being relegated to another Covenant. Australia was no longer pushing for the equal recognition and enforcement of rights. As such, it did not have a strong view as to whether the rights were placed in a separate part of the Covenant on Human Rights or a subsequent Covenant. Economic and social rights were no longer a high priority for the Australian government.

In recommending the neutrality policy, it would appear that the Department of External Affairs were responding to the new Minister's evident lack of enthusiasm for economic and social rights. As KCO (Mick) Shann reported in September 1950 : '[t]he Minister regards the drafting and incorporation of economic and social rights at this time as "highly dangerous". He cannot see why we should go ahead with such ideas when there are so many things relating to the main purposes and objectives of the Charter which deserve our prior attention.' [88] A similar 'low-priority' attitude to economic rights was demonstrated again in October 1950 when the Minister was reported as issuing a 'go-slow' on economic rights.[89]

Besides dampening Australia's enthusiasm for economic and social rights, Spender was to have a profound effect on shaping the Australian philosophical approach to economic and social rights. In March 1950, Spender annotated a submission dealing with economic and social rights with the following comment:

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88 Letter from Minister of Australian Mission to the UN to the Secretary, DEA, 29/9/50, in NAA A 432/20, Item 54/3779 Pt 5.

89 Submission to Minister for External Affairs, annotated by Percy Spender, 24/10/50, in NAA A1838/1, Item 856/13 Pt 10.

> when dealing with social and economic rights it should always be stressed that such rights impose correlative duties, indeed, should be conditioned by such duties. It is proper therefore, that the Australian Delegation should bear these 'duties' in mind when directing its attention to 'rights'. The idea that the so-called 'welfare state' exists to afford benefits to the people has to be corrected. [90]

With the brief comment, Spender implicitly rejected the previous orthodoxy. Social and economic rights were not to be considered free-standing rights of individuals, but were one part of an equation and could not be separated from individuals' duties. Indeed duties fashioned the shape of the economic and social rights.

Implicit in this statement was a belief that government did not exist to provide benefits to the people. Instead, the government had the power to confer benefits when and only when individuals fulfilled their duties to society. Economic and social rights themselves thus were not concerned with ensuring the individual received his/her entitlements, but were the means of codifying the mutual obligations between government and the individual. Within this system of mutuality, the government had a minimal role to play in providing for economic wellbeing. The primary obligation lay with the individual. It was a vision that was reflected in the amended proposals Australia advanced in relation to draft economic and social provisions.

(ii) Attitudes towards the Substance of Economic and Social Rights

In keeping with Spender's pronouncement that economic and social rights were 'conditioned' by duties, Australia proposed specific clauses embodying this relationship between rights and duties. In the March 1950 submission mentioned above, Spender suggested amendments to the 'basic rights' previously supported by Australia. As a result the Australian representative presented a revised set of rights to the Sixth Session of the Commission on Human Rights in May 1950. They read:

> 1. Everyone shall have the right to work, *and correlatively shall be under the duty to fulfil his obligations with respect to work for which he is voluntarily engaged.* Each State shall take such measures as may be practical to ensure that all persons ordinarily resident in its territory have an opportunity for useful work.
> 2. In order to ensure fair and reasonable wages and working conditions in occupations where wages and conditions are not determined by collective bargaining, or

[90] Submission to Minister for External Affairs, annotated by Percy Spender, 12/3/50, in NAA A 1838/1, Item 895/3/12.

other arrangements are not available against exceptionally low wages, the states shall establish and maintain machinery for fixing minimum wages and conditions.
3. Everyone shall have the right to social security which shall be guaranteed by the provision of social benefits, either in cash or in kind, assuring to every person at least the means of subsistence and, when necessary, adequate treatment in any common contingency occasioning the involuntary loss of income or its insufficiency to meet family necessities. *The State may prescribe that all or any of such benefits may be provided under a general contributory system.*
4. Everyone has the right to education. Free education shall be available for all, at least in elementary and fundamental stages. (emphasis added)[91]

In introducing these rights, HFE (Fred) Whitlam, Australia's representative explained the introduction of the 'duty concept' as follows:

> Attention is invited to the statement of correlative duty in the first article. In the view of the Australian Delegation, it is appropriate and necessary that duty should be associated with right in the proposed article, and the Australian Delegation places emphasis on this mutuality of obligation. Attention is also invited to the provision in the third article concerning a contributory system. In this respect, the Australian Delegation wishes to guard against any interpretation, or inference, that provision of social benefits should necessarily be independent of any individual contribution.[92]

Other delegations at the Commission on Human Rights were not convinced and Whitlam did not press the point after his initial speech. This defeat, however, did not affect Spender's vision.

In advancing this 'duties' view, Spender was expressing a personal vision, rather than agreeing with departmental advice. Indeed in the aftermath of the Sixth Session (1950), Spender received stringent criticism of his stance. The Secretary of the Department of Labour and National Service, Dr Ian Sharp was openly critical of Spender's suggested amendments for the right to work. First, he pointed out, the phraseology was out of keeping with the remainder of the Covenant. The Covenant dealt with rights that the State must ensure the individual had, whereas the insertion of a duty to fulfil work obligations widened the scope of the Covenant to cover the duties of an individual to an employer. Secondly, its inclusion together with enforcement clauses might legitimate international scrutiny of an individual's actions. Dr Sharp argued that such a consequence would by contrary to Spender's avowed intention to avoid undue international interference in matters of domestic jurisdiction. Thirdly, if the intention of introducing a duty to fulfil work obligations was to prevent strikes, Dr Sharp suggested

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91 Cablegram APR Renouf to IG Sharp, of Labour and National Service, undated, in NAA A 1838/1, Item 929/4/4 Pt 1.

92 Copy in NAA A 1838/1, Item 856/13 Pt 8; Summarised in UN Doc E/CN.4/SR 184, 3-4; 9 May 1950.

that the phrasing was inadequate. A strike could be considered the cessation of employment and thus outside a duty to fulfil work obligations. Fourthly, Dr Sharp indicated concern that the suggestion might give rise to an implication that a person is not under a duty with respect to work obligations which have not been voluntarily undertaken – such as national service.[93]

In relaying these criticisms to a fellow officer for ultimate transmission to Spender, Alan Renouf (then a junior officer of the Department of External Affairs) indicated that he considered Sharp 'to be right'.[94] At the same time Renouf predicted that Spender would not be receptive to Sharp's point of view. Renouf was vindicated. When informed of Sharp's criticisms, Spender responded even more insistently:

> The phrase may require some re-drafting but any right accorded by a State may be absolute or qualified. In my view it ought to be qualified by some duty whether in form above or another. I think we always tend these days to place emphasis on rights of individuals without any consideration of duties. To every right or for nearly every one there should be some correlative duty.[95]

Despite this affirmation of commitment, Whitlam as Australia's representative appears to have exercised considerable latitude in adopting a low-key approach to the promotion of correlative rights-duties approach. In late April 1951, for instance, Whitlam reported that he had been unable to pursue the 'duties' point given that the delegations he was working with most closely (the United Kingdom, the United States and Denmark) considered that references to duties were illicit on policy grounds. Whitlam had thus been averse to raising the issue. He undertook that, should the Commission move to adopting a detailed form of rights, he would then push for inclusion of references to duty.[96] In the meantime, Whitlam expended his energy on minimising references to economic and social rights.

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93 Letter from IG Sharp, Department of Labour and National Service to the Secretary, DEA, 29/3/51, in NAA A 1838/1, Item 929/4/4 Pt 1, see too summary in NAA A 1838/1, Item 856/13/7 Pt 2.

94 Handwritten note from APR Renouf to T Pyman, date obscured, in NAA A 1838/1, 929/4/4 Pt 1.

95 Memorandum from AH Tange, DEA to Australian Representative to the Commission on Human Rights, 13/4/51, in NAA A 1838/1, Item 856/13/10/6 Pt 1.

96 Cablegram from Australian Delegation to Human Rights Commission to DEA, 23/4/51, in NAA A 1838/1, Item 856/10/10/6 Pt 2.

While adhering to an outward stance of support for the inseparability of economic and social rights from their civil and political counterparts, Australia moved towards advocacy for briefer, less specific economic and social rights. In May 1950, Whitlam reiterated Australia's support for economic and social rights in principle:

> If freedom, justice and peace are not possible in the world without remedying such inequalities, as in effect the nations have declared, then economic and social rights must be regarded as inseparable from the rights which we have been considering – mainly civil rights, and as having no less a claim to protection by law.[97]

Later in this speech, Whitlam concluded that it was not feasible nor 'even desirable' to go beyond the basic rights suggested by Australia given the varieties of industrial and social contexts in which the rights were to operate.[98] Elaboration on a universal level beyond basic terms was conceived as impossible 'for a considerable period of time.'[99] His criticism was directed in particular at the more extensive formulation of rights being advanced by the Yugoslavian and Soviet delegations, and indeed the original proposals of Australia.

By April 1951 Australia was submitting that all the economic and social rights could be included within the one clause. Whitlam's suggestion was for the Covenant to include the general clause:

> Each State party to this covenant recognises that everyone has the right to education and cultural advancement, the right to physical and mental health, the right to work, the right to just and favourable conditions of work, the right to rest and leisure, the right to an adequate standard of living and the right to social security.[100]

According to this proposal, the clause would be followed by two other clauses dealing with implementation matters. In approach, this proposal was most similar to the recommendations that had been made previously by the United States to keep references to economic and social rights brief. A note by Arthur Tange in early 1950 reveals that Spender approved a fall-back position of supporting the United States' position.[101] Fred Whitlam, though appears to have been the person responsible for

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97 Statement by Australia, 'Economic and Social Rights', Annexed to Report of the Australian Representative to the Sixth Session, Commission on Human Rights, 30/5/50, Copy in NAA A 1838/1, Item 856/13 Pt 8.

98 *Ibid.* Whitlam did however, foreshadow, that more detailed provisions could be drafted by the International Labour Organisation.

99 HFE Whitlam, Australian Representative, UN Doc E/CN.4/SR 184, 4; 9 May 1950.

100 L/CN.4/543, 18 April 1951.

101 Letter from AH Tange, for the Secretary DEA to External Affairs Officer, Australia House, London, 22/3/50, in NAA A 1838/1, Item 856/13 Pt 5.

activating this strategy. Whitlam worked with 'friendly delegations', in particular, the United States, the United Kingdom and Denmark[102] to draft the list of rights. This style of clause was in keeping with Whitlam's oft-expressed aversion to the imprecise language introduced by other delegations to give the Covenant 'popular appeal' and 'philosophic content'.[103] In the midst of the Department's coming to terms with the unexpected departure of Percy Spender and the appointment of Richard Casey as Minister for External Affairs, Whitlam's initiative was not subject to critical comment. Australia by this time was firmly identified with those countries seeking limited economic and social rights.

Several of the clauses regarded as problematic during the Evatt period continued to engender resistance. The equal pay clause and freedom of association clauses in particular evoked critical responses, though for slightly different reasons than in the Evatt period.

During the Spender period, the major issue for Australia in relation to the equal pay clause was not whether equal pay should or should not be given to women. It was whether the Commonwealth possessed the constitutional power to pass legislation dealing with equal pay. In the aftermath of the Commonwealth Arbitration Court's rejection of the equal pay claim in the *Basic Wage* case,[104] the Attorney-General's Department had reached the conclusion that the High Court would probably invalidate any Commonwealth national legislation on the topic of equal pay.[105] The Department of Labor and National Service remained hostile to the 'glib and emotive' nature of the 'equal pay' phrase that would be taken by women's organisations to mean 'only one thing'. Their suggestion was to replace the term 'equal pay' with the phrase used by the

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102 Cablegram from Australian Delegation to Human Rights Commission to DEA, 23/4/51, in NAA A 1838/1, Item 856/10/10/6 Pt 2.

103 Draft Report of the Australian Representative to the Seventh Session to the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/6 Pt 3.

104 *Basic Wage Inquiry 1949-1950*, (1950) 68 CAR 698. The original judgment was handed down in March 1949 and a further ruling was handed down in April 1950.

105 Memorandum on Article 21 – Equal Pay for Equal Work, undated, in NAA A 432/20, Item 54/3779 Pt 6.

International Labour Organisation, 'equal remuneration for men and women workers for work of equal value'.[106] It was a recommendation accepted by the Department of External Affairs and Spender and thus incorporated into the comments forwarded to the ECOSOC in 1951.[107] It was clear, however, that the change of language was not intended to commit the Australian government to implementing equal pay for men and women, but was to be a method of obfuscating the debate.

Rights related to industrial organisation also received particular scrutiny. Spender and the Department of External Affairs feared the implications of the freedom of association guarantee for the recently introduced *Anti-Communist Bill.*[108] Upon being notified that the Commission on Human Rights was proceeding with work on the freedom of association clause, the Department of External Affairs sent a cablegram to the Australian Mission to the United Nations informing them that the Department was reviewing the draft human rights articles in light of 'recently introduced legislation' in May 1950.[109]

Within the Australian bureaucracy, the Spender period is also noteworthy for the wariness displayed by Departments concerning the resource implications of economic and social rights. The Department of Health described the right to social security through medical care as a 'naturally desirable end', but regarded the means of achievement of this right as unclear and impossible under existing legislation.[110] Similarly, the Department of Social Security reported that whilst it agreed with the right to social security, an exception should be permitted for non-nationals.[111] The fact that

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106 Quoted in letter from AH Tange, Assistant Secretary, DEA to the Secretary, Attorney-General's Department, 9/5/51, in NAA A 1838/1, Item 929/4/4/ Pt 1.

107 E/2059/Add 4. Note also that Australia continued to resist recognition of the right to property when it was raised as an additional article.

108 *Communist Party Dissolution Bill 1950* (Cth). This Bill is discussed more fully in Chapter 2. The Bill outlawed communist associations and allowed the State to seize the assets of organisations declared to be communist.

109 Cablegram from DEA to Australian Mission to the UN, New York, 4/5/50, in NAA A 1838/1, Item 856/13 Pt 8.

110 Memorandum from AJ Metcalfe, Director-General of Health to the Secretary, DEA, 8/3/50, in NAA A 1838/1, Item 856/13 Pt 8.

111 Quoted in Memorandum from the Secretary, DEA to the Secretary, Department of Labour and National Service, 23/1/50, in NAA A 1838/278, Item 856/13/7 Pt 5.

such feedback was received during the Spender period and not earlier could be regarded as reflective merely of the further drafting that had taken place on economic and social rights which made the resource implications more obvious than had been the case in the Evatt period. In the context of a political mood-swing against expansive government intervention in the economic matters of individuals (discussed later), the comments of the Departments appear to have a broader significance.

To what extent can these changes be attributed to either the Cold War or Australia's engagement with the Cold War? There is evidence that the Department of External Affairs took the Cold War into account in making recommendations concerning economic and social rights in 1950 and 1951. In its October 1950 submission to Spender, for instance, the Department of External Affairs noted that having two rival schemes of rights (economic versus civil) would serve to divide rather than unite the East and West. The better (unifying) road they identified was to support one Covenant.[112] In 1951, the delegation perceived itself taking a middle road between the United States and the USSR by proposing the inclusion of basic rights expressed in short, concise language with a separate scheme of implementation.[113] It is also evident that as a temporal matter, the issue of anti-communism within both the international arena and the domestic arena had great currency. 1950 saw the commencement of the Korean War. The 1949 election had been won by the Coalition in Australia at least partly on the basis of the Coalition's anti-communist scare campaign that linked Labor's socialist platform to the advancement of communism.[114] The intensification of the Cold War appears to have contributed to an increased identification of Australia with its Western colleagues.[115] Yet, the substance of the policies adopted by Australia reveals more anti-socialism than anti-communism. As such, they reflected less a response to

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112 Submission to Minister of External Affairs, annotated by Percy Spender, 12/3/50, in NAA A 1838/1, Item 895/3/12.

113 Report of the Australian Representative to the Seventh Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/6 Pt 3.

114 C Hazlehurst, *Menzies Observed*, Allen and Unwin, Sydney, 1979, 315.

115 An example of this identification is that in the October 1950 Submission prepared for Spender, the DEA drafted their recommendations in terms of Australia supporting the United Kingdom and the United States: Submission to Minister for External Affairs, annotated by Percy Spender, 24/10/50, in NAA A 1838/1, Item 856/13 Pt 10.

the Cold War than the ascendance of the political ideology of the Liberal Party which emphasised the role of the individual, rather than the government, in economic development. As Geoffrey Sawer noted, the values of the Menzies government were the 'values...of modern conservatives in a welfare state whose main economic base is private enterprise'.[116]

When the Liberal Party won government as part of a coalition with the Country Party, it was still in its first bloom. Formed during the 1944-45 period from a coalition of non-Labor forces, it was committed to an individualist perspective on economic growth. The private sector, rather than the government, had the major role to play in Australia's economic development. The objectives of the Party agreed upon at the October 1944 Conference (in which the Liberal Party gained its name) capture the prevailing ideology. The third objective of the party was stated as striving to have a country:

> 3. In which an intelligent, free and liberal Australian democracy shall be maintained by:
> ...
> (c) freedom of citizens to choose their own way of living and of life, subject to the rights of others;
> (d) protecting the people against exploitation;
> (e) looking primarily to the encouragement of individual initiative and enterprise as the dynamic force of reconstruction and progress.[117]

From this objective, the State was given some role in protecting people against exploitation. However, clearly it was up to individuals to take up the challenge of pursuing their initiatives. The use of the term 'freedom' too seems deliberate and evocative of John Stuart Mill type notions of freedom.[118] The State's role was to minimise its intervention in individuals' lives. Prosperity was linked to the growth of good relations between employers and employees, with the Party striving to have a country 'in which employer and employee have a sense of common interest and duty,

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116 G Sawer, 'The United Nations' in G Greenwood, N Harper (eds), *Australia in World Affairs, Vol 2: 1956-1960*, FW Cheshire, Melbourne, 1963, 145.

117 *Forming the Liberal Party of Australia: Record of the Conference of Representatives of Non-Labour Organisations*, Canberra, mimeo, October 1944; University of Queensland collection. The Liberal Party's platform is also extracted in DM White, *The Philosophy of the Australian Liberal Party*, Hutchinson, Melbourne, 1978, 25-27.

118 John Stuart Mill posited that there was a sphere of action in which the individual had a paramount interest and the society little, if any interest. This sphere of action included an individual's domain of consciousness, liberty of tastes and movement, and the freedom to unite. The only basis on which interference with this sphere could be justified was self-protection (either individual or collective): see JS Mill, *On Liberty*, ed by S Collini, Cambridge University Press, Cambridge, 1989, 13,15.

and share as co-operators in all advances to prosperity, and in which living standards rise steadily as physical resources expand and ingenuity grows'.[119] The platform spoke of the need for social provision to be made but stipulated that it would be made 'on a contributory basis'.[120] Employment at good wages was to be available to 'all willing and able to work'.[121] The Liberal Party's initial leader, Robert Menzies explained that development was the result of initiative, risk-taking and ambition. He discounted the role of government by stating:

> These things are not produced by Government Departments or by learned clerks. They will be produced in the future as in the past by letting the citizen understand that there are still rewards for the courageous and the intelligent and the vigorous and that the enterprise of the individual citizen is still the essential foundation of the development of the State.[122]

As a party that grew out of a coalition of non-Labor forces, the Liberal Party was vigorously opposed to policies that were associated with the Labor Party including the nationalisation of industry and extensive state engineering of the economy. It was a particularly strong commitment in the context of the previous battles that had been fought concerning bank nationalisation.[123] Thus in engineering a shift to Australia's economic and social rights policies, Spender was pursuing a distinct Liberal Party vision of small government supporting individual initiative. The Cold War undoubtedly helped to intensify the commitment to defeating socialism in Australia. However, the transformation in Australian policies owed more to domestic political ideologies than super-power rivalries.

III. Casey and Bureaucratic Period

In the fifteen years following the departure of Spender as Minister for External Affairs, many of the trends commenced under Spender continued. Notwithstanding that defeat

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119 Clause 7, *ibid.*

120 Clause 8, *ibid.*

121 Clause 6, *ibid.*

122 RG Menzies' 1946 electoral speech quoted in I McAllister, R Moore (eds), *Party Strategy and Change: Australian Electoral Speeches Since 1946*, Longman Cheshire, Melbourne, 1991, 163.

123 As to the mobilising effect of the Labor government's attempts to nationalise banks (attempts which were ultimately held unconstitutional by the High Court and the Privy Council), see G Henderson, *Menzies' Child: The Liberal Party of Australia,* Allen and Unwin, Sydney, 1994, 96-97.

was all but conceded in gaining recognition of 'correlative duties', Australia moved further away from the equality of all forms of rights, being more explicit about the aspirational, non-legal nature of rights. Emphasis was placed on the 'progressive' nature of economic and social rights and an aversion displayed to economic and social rights having resource implications. With the increase in bureaucratisation of policy development came an increase in policies designed to cocoon domestic policies from the reach of economic and social rights. All vestiges of Evatt's enthusiasm to use international economic and social rights to transform society disappeared as policy-makers sought to keep economic and social rights 'at a safe distance'.

(i) Attitudes Towards Economic and Social Rights

It is difficult to draw a clear line in policy development between the end of Spender's period and the beginning of Richard Casey's period as Minister for External Affairs. Casey's appointment came in the midst of the Seventh Session of the Commission on Human Rights in 1951. The Department of External Affairs recommended to Casey that Australia approve a separate part in the Covenant dealing with economic and social rights. Casey was told of the Department's fear that omission of such a part in the Covenant would lead to pressure to work out new instruments entirely devoted to economic and social rights and thus tending to cover ground already effectively covered by specialised agencies including the International Labour Organisation. As a further argument, the Department reported that Australia had been resisting pressure from South American countries in the International Labour Organisation to embark on a broad convention or recommendation embracing labour and social rights. Inclusion of economic and social rights in the Covenant would be of assistance in preventing such a development. Casey agreed that Australia should continue to support a separate part to the one Covenant unless in doing so Australia would become isolated.[124]

[124] Submission to the Minister on Economic, Social and Cultural Rights, 11/5/51, in NAA A 1838/1, 856/10/10/6 Pt 2.

Australia's position on this issue was to change in late 1951, in the lead up to the General Assembly's reconsideration of the matter. As of November 1951 the Department of External Affairs wrote to Fred Whitlam reaffirming its neutrality:

> Departmentally we appreciate that, technically, the present draft could quite readily be divided into two draft conventions, particularly if our views were adopted regarding the application of the two implementation methods. However, we do not have any strong views on the matter and consider that circumstances on the spot, together with the brief should enable the Delegation to make a recommendation to the Minister as between the alternatives.[125]

By December 1951 Whitlam was reporting that he regarded the paramount consideration for Australia to be 'not to do anything which might jeopardize the chance of providing for twin covenants'. [126] By the 1951 General Assembly debates, the Australian representative, Ralph Harry, stated categorically a new attitude to the issue:

> The Australian Government has always been of the view that the obligations of states with regard to economic and social rights should be set out in a separate instrument, not of less importance, not less urgent, but separately formulated because of the essential difference in its obligations.[127]

Ralph Harry's speech is interesting not only for its rather ahistoric view of Australia's attitude, but for its summation of Australia's acceptance that economic and social and social rights were 'essentially different'. In the 1953 Commission on Human Rights Brief for the Ninth Session, an outline of this 'essential difference' was provided:

> Most of the members of the Commission also appear to recognise that 'rights' as applied in the economic and social field are somewhat different from rights in the civil and political field, being more in the nature of aspirations to be achieved over a period of time. In brief, the word 'right' is being used here in the limited sense of not bestowing specific rights sanctioned by law but of laying down desirable standards which States should aspire to attain.[128]

The difference was thus not merely in the means of implementation, but in the very nature of the categories of rights. Economic and social rights were not 'true rights', but merely standards or aspirations. It was an understanding that was nascent in Australia's policy in relation to implementation of economic and social rights during the Spender

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125 Memorandum from TA Pyman to Australian Delegation to the Sixth Session of the UN General Assembly, Paris, 6/11/51, in NAA A 1838/1, Item 856/13/22.

126 Minute of Meeting between HFE Whitlam and TA Pyman, 17/12/51, in NAA A 432/20, Item 54/3779 Pt 6.

127 Copy of Statement in NAA A 1838/1, 856/13/10/7 Pt 2. A summarised version is reported at UN Doc A/C.3/SR 363, 101; 10 December 1951.

128 Brief for the Australian Delegation to the Ninth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/8/1.

period,[129] but was not stated more explicitly in later years. It was to underlie Australian policy development until the finalisation of the Covenants.

The issue of correlative duties was permitted to die a quiet death. Soon after Casey was appointed Minister, the Department of External Affairs sought to gain policy approval for a move away from insistence on the inclusion of correlative duties in substantive rights of the ICESCR. The Department argued that efforts had not succeeded to date and that Fred Whitlam had reached the conclusion that the only realistic opportunity to introduce the concept of duties would be in the context of drafting an introductory article or an obligations clause.[130] Casey was not entirely persuaded. On the Ministerial Submission presented to him, he wrote: 'I agree entirely with the need to integrate rights and duties. Stress – but not to the extent of isolating us from our principal friends'.[131] Casey was concerned in particular about the attitude of the United Kingdom and the United States.[132]

Faced with this direction, Fred Whitlam did not press the duties-related wording favoured by Spender. He supported more modest drafting changes. In relation to the right to work, for instance, Whitlam voted in favour of the French qualification that a person have the right to work 'if he so desires'. As he later explained to the Department, he saw such an amendment as having the virtue of limiting government responsibility to the obligation of creating favourable economic conditions to support employment rather than provide individuals with work 'as a hand out'.[133] Consistently with his earlier prediction that it might be possible to address the duties point in the preamble, Whitlam drafted an amendment, in consultation with Sweden for submission to the Eighth Session of the Commission on Human Rights. A joint text was produced

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129 See Chapter 6.

130 Submission to the Minister for External Affairs, 'Inclusion of Economic, Social and Cultural Rights in the Draft Covenant', 11/5/51, in NAA A 1838/1, Item 856/13/10/6 Pt 2.

131 *Ibid.*

132 Cablegram from DEA to Australian Delegation, Geneva, 21/5/51, in NAA A 1838/1, Item 856/13/10/6 Pt 2. See too Report of the Australian Delegate to the Seventh Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 1.

133 Report of the Australian Delegate to the Seventh Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 1.

which was tabled and accepted by Chile and Yugoslavia.[134] The duties issue was not to be raised again by the Australian delegation.

(ii) Attitudes towards the Substance of Economic and Social Rights

Australia made little original contribution to the substance of economic and social rights to be included in the ICESCR from mid-1951 to 1966. In the debates on the content of economic and social rights, held primarily in 1956-7 and 1962, Australia tended to volunteer minor drafting amendments rather than propose substantive substitute texts. Casey and his successors did not introduce policy directives of their own concerning the substance of rights. Policies thus seem to reflect the largely uncritical adoption of policies adopted by Spender, Whitlam and the Department of External Affairs in the early 1950s.[135]

The first feature of Australian contributions to debates on the substance of economic and social rights during this period is the emphasis on a limited role for government in interfering in the private sector. In relation to the draft discrimination clause, the right to work clause, the right to an adequate standard of living clause and the right of trade unions to function freely, objections were stated on the basis of fixed State roles. In relation to the right to work, for instance, it was suggested that government could carry out only limited activities in a field dominated by private employers. It was not appropriate for the government to take on a role interfering between management and employees and interfering in the procedures of the arbitration tribunal.[136] Similarly, in relation to trade union rights, it was said that trade unions were properly outside the realm of the State and that any government action, even to protect the functioning of the trade union, would constitute undue interference in the private sphere.[137] This

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134 UN Doc E/CN.4/L 171.

135 Indeed from 1955 until 1965, the section on economic and social rights in the Briefs prepared for Australian representatives to the Third Committee of the General Assembly remained virtually identical.

136 White, Australian representative, UN Doc A/C.3/SR 1205, 351; 7 December 1962.

137 RN Hamilton, Australian representative, UN Doc A/C.3/SR 723, 213, 7 January 1957. Additional particular issues with the ICESCR are raised in other Chapters of this thesis – see Chapter 3 concerning migrant work contracts, and Chapter 5 concerning the need for federal-state and colonial application clauses.

consolidation of visions of the proper realms of the private and public dovetailed with the 'small government' approach of the Spender period.

The second feature is the overriding concern of Australian policy to have economic and social rights drafted in such a way as to minimise their impact on domestic policies (of a budgetary, legislative or policy variety). Although Whitlam gained a reputation as being a pedant in relation to drafting,[138] his frequent interventions on the form of clauses seem primarily motivated by his desire to safeguard Australian laws. The Department of External Affairs coordinated consultation with Commonwealth departments and state justice departments to provide a compilation of comments and concerns. The compilation reproduced in the 1955 Brief for the General Assembly served as the basis for the submissions of Australian representations during the later debates. Thus for instance, equal pay continued to be resisted on the basis that though it might command wide support as an objective, 'many States' would find it difficult to apply.[139] Resurrected proposals for a right to property were rejected on the basis that they would restrict the exercise of legitimate powers in a democratic State.[140] The inclusion of detailed obligations concerning the right to education was also resisted, given the problems that would be encountered in meeting such obligations in Australia.[141] The Brief also noted other concerns which arose from state legislation such as the employment of children aged 14-16 years, a practice that was to be taken into account in debates on any prohibition on child labour.[142]

The fact that Briefs were dominated by 'shopping lists' of concerns without major comment or analysis is indicative of the preference afforded to protection of domestic

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138 G Sawer, 'Problems of Australian Foreign Policy: June 1956 – June 1957' (1957) 3 *Australian Journal of Politics and History* 1, 9.

139 RN Hamilton, Australian representative, UN Doc A/C.3/SR 716, 176; 20 December 1956.

140 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 413, 8-9; 25 February 1954

141 Australia opposed in particular the imposition of an obligation on governments to provide a two year plan in relation to the implementation of its education responsibilities: T Pyman, Australian representative, UN Doc A/C.3/SR 789, 138; 23 October 1957. This topic is also dealt with in Chapter 4.

142 Brief for the Australian Delegation to the Seventh Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/7 Pt 2.

practices from the scope of international scrutiny. Rather than the negotiation of these international instruments providing an opportunity for the reconsideration of domestic policies or a looking to the international instruments as a tool for transforming current practices (as in Evatt's period), priority was given to ensuring non-interference with existing practices and policies. Even when there was dispute as between the Federal and state authorities as to appropriate policy, as in the case of the 'preference to unionism' question, a choice was not made between the two policies. Instead, the preferred solution was to have wording adopted that permitted states to choose their own policies in the area.[143] Not all concerns raised in the Briefs appear to have been raised in open debate. This in turn reflects the third feature of the period – an emphasis on the fact that economic and social rights needed only to be 'progressively implemented'.

In both public international arenas and within the context of Australian governmental consultations, Australia unflinchingly stressed the non-immediate nature of any future economic and social rights. In addition to categorising economic and social rights as 'aspirational' (discussed above), a vigilant watch was maintained to ensure the progressive implementation obligation embodied in the draft Covenant was not eroded. Thus, in relation to debates on the right to an adequate standard of living, the Australian representative, Robert Hamilton, expressed concern that the proposed draft lost sight of the progressive nature of the obligation.[144] In an inter-departmental committee meeting held in July 1951, for instance, Whitlam explained the 'progressive implementation' clause. The minutes record that all agreed progressive implementation was 'essential'.[145] Similarly, in 1952, in the official publication of the Department of

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143 Brief for the Australian Delegation to the 10th Session of the General Assembly, NAA A 462/21, Item 575/1.

144 RN Hamilton, Australian representative, UN Doc A/C.3/SR 743, 310; 28 January 1957. The initial language used by Australian representatives to support progressive implementation was often in the form that this was needed in recognition of the limited resources of many countries of the world – a generalised, rather than specific or personal plea: see eg Copy of Statement by Australian representative on Article 2 of the Draft Covenant on Economic, Social and Cultural Rights, circa 1/12/55, in NAA A 432/68, 68/2797 Pt 3.

145 Notes of Interdepartmental Meeting on Draft Covenant on Human Rights, 20/7/51, in NAA A 1838/1, Item 856/13/7 Pt 2.

External Affairs, *Current Notes*, Western countries' emphasis on the progressive implementation of economic and social rights was described as 'realistic'.[146] Despite the opposition of the Soviets and Latin Americans, it was concluded that a majority of the Commission appeared to accept the rights were directly related to resources and gradual technological advance.[147] Other Departments were quick to adopt this outlook. As early as 1952, for instance, the Department of Social Security noted the view of the Department of External Affairs that this clause would excuse discrimination on the basis of nationality in pension distributions.[148] Indeed by 1967, when explaining the effect of the ICESCR obligation clause to Commonwealth and State Departments, the progressive implementation clause was identified as the most important feature of the Covenant.[149]

The Cold War was undoubtedly a lens through which Australian policy-makers viewed divisions on the international level. By 1954, the Briefs referred to 'the Western point of view' in relation to the order in which the Covenants should be finalised.[150] It was assumed that Australia was in the Western group. Rising tensions in international arena may also have contributed to the decline in interest of Liberal Ministers in the negotiations of the International Bill of Rights. However, the Cold War is not a sufficient explanation for the growing caution evident in Australian policy. The crystallisation of tendencies evident in the Spender period and the adoption of a greater caution with respect to domestic policies seem referable to the position faced by bureaucrats in developing human rights policy. It is likely that bureaucrats such as Fred Whitlam and his successors would have sought to anticipate the policies appealing to

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146 (1952) 23 *Current Notes* 340.

147 Report of the Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/7 Pt 2A. The opposition to the 'progressive' element was attributed by the author of the report to the pursuit of (anti-West) propaganda purposes.

148 Letter from FH Rowe, Director-General, Department of Social Services to the Acting Secretary, DEA, 31/7/51, in NAA A1838/1, Item 929/4/4 pt 2. Emphasis on the progressive nature of economic and social rights was also noticeable in the responses received by the DEA in 1966 from other Commonwealth Departments: see for example, Minute from JD Petherbridge to MR Booker, 15/12/66, International Covenants on Human Rights, in NAA A 1838/1, Item 929/4 Pt 22.

149 Memorandum on the International Covenant on Economic, Social and Cultural Rights, 19/6/67, authored by P Brazil, AA A 446/165, Item 1970/76776.

150 Brief for the Australian Delegation to the Ninth Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/8/1.

their political superiors. Hence the emphasis on limited government. In addition, in the absence of specific direction, bureaucrats would have been reluctant to commit the government to any policies with resource implications. Thus the bureaucratisation of policy-development was a powerful influence in shaping a conservative approach to economic and social rights.

Conclusion

This Chapter has shown the insufficiency of existing generalised accounts of Western States' responses to economic and social rights to explain the shifts in Australian policies towards economic and social rights. Behind the continuous areas of resistance revealed in this Chapter were not ideological forces, but bipartisan concerns to safeguard sensitive policies, particularly those concerning wage structures and governmental power to acquire property. Similarly, whilst the divergences of approach of Australian State actors at times were clothed in the language of East-West conflict, an examination of the shifts in policy reveal the importance of fundamentally different conceptualisations of the basis of economic and social rights. Evatt, with his Labor-Party inspired belief in a socialist transformation of society for the benefit of individuals, was receptive to and encouraging of the drafting of broad economic and social rights. His Liberal successors were hostile to the exercise of centralised power and envisaged government's role as protecting an individual's right to pursue his/her economic goals. Once policy development became dominated by bureaucrats, priority was given to narrowing the scope of economic and social rights in order to protect pre-existing federal and state government interests. The result was an increasing emphasis on the 'progressive' nature of economic and social rights and a total disengagement with any notion of the recognition of economic and social rights being the catalyst for the creation of enforceable legal rights. The interpretation likely to be given to the finalised text of the ICESCR by bureaucrats in 1966 was thus profoundly different from that likely to have been given by Evatt and his Labor colleagues in 1949.

Chapter 2

Civil and Political Rights

Introduction

This Chapter focuses on Australian policy towards the development of civil and political rights in the UDHR and the ICCPR. It is one area in which Australia might have been expected to proffer continuous support. Often described as 'first-generation' rights to draw attention to their long heritage,[1] civil and political rights are assumed to be easily accommodated into legal systems which emphasise the rule of law and the importance of individual liberties. Even within what I have previously termed the 'Cold War account' of human rights development, Western States are viewed as having championed civil and political rights 'as being the foundation of liberty and democracy in the "free world"'.[2] It appears as quite a contrast, therefore, to note that when the clauses of the ICCPR were finalised, Australian delegates abstained from six substantive rights and opposed two clauses outright.[3] This level of opposition raises the question: how supportive of civil and political rights was the Australian State during the negotiations of the International Bill of Rights?

The analysis carried out in this Chapter reveals that Australian policy was indeed marked by a level of comfort with the recognition of civil and political rights. From 1950 onwards, Australia was even proclaiming such rights to be the 'gift' of the Western nations to less-developed nations. Somewhat paradoxically, as the intensity of Australian support for civil and political rights increased, so too did Australia's reservations about the scope of rights being proposed. Throughout the period of

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1 See for example, DJ Harris, *Cases and Materials on International Law* (4th ed), Sweet and Maxwell, London, 1991, 601. The term 'second generation rights' is used commonly to distinguish economic, social and cultural rights, from 'first generation' civil and political rights. Rights such as the right to a clean environment and the right to peace have frequently been termed called 'third generation rights'.

2 MCR Craven, *The International Covenant on Economic, Social and Cultural Rights*, Clarendon Press, Oxford, 1995, 8-9. See also the discussion in the Introduction to Chapter 1.

3 Australia abstained on Articles 2,6,7,12,14 and 24 of the ICCPR. It voted against Articles 1 and 20. The bases of Australia's objections are outlined in a memorandum of Patrick Brazil on the ICCPR, 19/6/67, in NAA A 446/165, Item 1970/76776.

negotiations Australia fought against a number of rights, in particular those likely to conflict with Australian immigration and indigenous policies and those that restricted freedom of expression and information. During the Spender, Casey and Bureaucratic periods, however, the number of clauses considered unacceptable grew as Australia stressed a traditional 'civil liberties' view of civil and political rights. While international pressures served to rein in some of Australia's reservations, Australia's relationship with civil and political rights remained one of ambivalent enthusiasm.

Overview of the International Debate

There was little debate during the negotiations of the International Bill of Rights as to either the legitimacy of the category of civil and political rights or the suitability of such rights to be contained within international instruments.[4] When the UDHR was drafted it contained over 20 civil and political rights. These included:

(a) *equality rights*: the right not to be discriminated against on specified grounds, equality before the law and equal protection of the law;
(b) *bodily integrity and liberty rights*: the right to life, liberty and security, the prohibition on torture and cruel and unusual punishment/treatment, prohibition on arbitrary interferences with privacy;
(c) *criminal justice rights*: the prohibition on arbitrary arrest, detention and exile, the right to a fair and public hearing (in criminal maters), the presumption of innocence and the prohibition of retrospective criminal laws;
(d) *status rights*: the right to recognition before the law, the right to nationality, the right to seek and enjoy asylum;
(e) *social and activity rights*: freedom of movement, the right to leave any country and return to one's own country, freedom of thought, conscience and religion, freedom of opinion and expression (though subject to limitations concerning incitement to discrimination), freedom of assembly, marriage rights, cultural rights, rights of minorities and self-determination;[5] and

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4 For a full account of the drafting of civil and political rights in the International Bill of Rights, see MJ Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987; M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, Kehl, 1993; J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999; V Pechota, 'The Development of the Covenant on Civil and Political Rights' in L Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981.

5 Because of their significance as collective rights and areas of particular interest to the Australian delegation, the two topics of rights of minorities and the right of peoples to self-determination are dealt with separately in Chapter 3.

(f) *political rights*: participation in public life, government and the right to vote.[6]

For the most part, the ICCPR refined and elaborated these rights. Additional rights were also drafted, including a specific reference to the equal right of men and women to enjoy rights, a right to be treated with humanity when in detention, a prohibition on imprisonment on the grounds of contractual debt, procedural protection for aliens facing expulsion, a right of compensation for wrongful conviction, a more specific prohibition on war propaganda, and the advocacy of hate speech, and clauses mandating special protection to be given to the family and children.

Initial debates over the framing of civil and political rights for the UDHR took place in 1948. In 1949-1952, discussion focused more on economic and social rights and self-determination. Detailed consideration of civil and political rights did not resume until the Ninth Session of the Commission on Human Rights in 1953. In 1954, a draft ICCPR text was conveyed to the General Assembly. The Third Committee of the General Assembly scrutinised the clauses from 1958 to 1961. Sporadically, work carried out by specialist bodies of the ECOSOC spilled into deliberations of the Covenant– work on the Draft Freedom of Information Convention being one example. There was also overlap between discussions on the ICCPR and ICESCR given the inclusion of some common provisions.[7] By 1962, however, the text of the substantive provisions of the ICCPR was largely settled. In 1966, the General Assembly adopted the ICCPR.

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6 The process of categorisation is problematic – many rights can be characterised in several ways – for example, the right to seek and enjoy asylum might be considered a political right, a social right or a status right. Similarly the prohibition on torture might be considered to be primarily a criminal justice right. This categorisation is designed simply to highlight the variety of interests protected by civil and political rights. Paul Sieghart has commented on the difficulty in classifying rights, in opting for 'purely functional' divisions: P Sieghart, *The International Law of Human Rights*, Clarendon Press, Oxford, 1983, 127.

7 Of such overlapping rights, this Chapter deals only with the right of non-discrimination. Freedom of association has been dealt with in Chapter 1. The right of self-determination is dealt with in Chapter 3.

I. Evatt period

Civil and political rights do not appear to have excited the passion of Evatt or early Australian delegates. Evatt gave no specific directions as to civil and political rights clauses. Few public statements were made by Australian delegates on point. On the occasions where delegates did offer drafting suggestions, however, their contributions indicated an ease with the recognition of broad rights in the civil and political fields and an enthusiasm for governmental action to guarantee the enjoyment of civil and political rights. Three exceptions to this equanimity are noteworthy. First, there was discomfort with proposed limitations on freedom of expression and information. Secondly, Australian delegates baulked at the inclusion of any right that would interfere with Australia's immigration policies. Thirdly, while endorsing principles of equality, Australian delegates sought to limit the application of civil and political rights that would interfere with the application of discriminatory policies, particularly those instituted with respect to indigenous people in Australia and Australia's external territories.

Neither the Australian departmental files, delegates' reports nor the official United Nations records display evidence of detailed Australian contributions to the drafting of the civil and political rights in the UDHR or early drafts of the Covenant. As noted elsewhere, Australia's decision to focus attention on implementation issues provides a partial explanation of this reticence.[8] The limited number of statements is also consistent with a certain complacency about the recognition of civil and political rights. Internal memoranda of the Australian Mission to the United Nations confirm a high level of acceptance of such rights. In EJR Heyward's memorandum dealing with economic and social rights, for instance, civil and political rights were given cursory

[8] As noted in Chapter 1, when in 1947 the Commission opted to establish three working groups to focus on the drafting of the Declaration, the drafting of the Covenant and implementation issues respectively, Australia elected to have primary representation on the working group concerned with implementation issues.

attention. Civil rights were described as having been secured 'during the 17th and 18th centuries by the bourgeois sectors who obtained political power through their economic strength – thus having enough economic security to enjoy those rights'.[9] Apart from the negative overtones of the reference to being the product of 'bourgeois agitation', the statement does not purport to challenge the legitimacy of the rights. Instead, the impression created was that civil and political rights were well-established, such that attention should be focused on other outstanding issues such as the protection of economic and social rights.

Looking at the limited drafting contributions that were made by Australian delegates in this field, it is evident that Australian policy endorsed broad government responsibility to further the realisation of civil and political rights. Governments were to take steps, legislative steps if necessary, to protect individuals from both governmental and private interference with civil and political rights. In relation to discussions on a prohibition on interference with an individual's reputation in the Commission on Human Rights, for instance, the Australian delegate suggested amending the clause so that it referred to an individual's right to *'protection under law* from interference with reputation' (emphasis added).[10] Similarly, in relation to prohibitions on (arbitrary) detention, the Australian delegate referred to the need to protect the individual against detention 'by anyone', not simply State officials.[11] Furthermore, Australia displayed a commitment to eliminating at least some current state practices such as the death penalty. Members of the Third Committee of the General Assembly were informed that whilst the death penalty remained on the statute books of several Australian states, the Australian Labor Party was committed to its abolition and would have no problem in committing to the progressive abolition of the death penalty as part of the right to life.[12]

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9 Letter from Australian Mission to the United Nations (EJR Heyward) to the Secretary, DEA, 11/6/48, in NAA A 1838/1, Item 856/13/7 Pt 3.

10 EJR Heyward, Australian representative, UN Doc E/CN.4/AC.1/SR 36, 7; 19 May 1948.

11 EJR Heyward, Australian representative, UN Doc E/CN.4/AC.1/SR 40, 7; 19 May 1948.

12 Alan Watt, Australian representative, UN Doc A/C.3/SR 103, 151; 15 October 1948.

The Australian preference was to have civil and political rights drafted with precision so that individuals would know the extent of their rights. It was a preference, however, that gave way at times to a pragmatic desire to have clauses adopted by a majority. A classic example of this was the Australian approach to the prohibition on detention ultimately contained in Article 9(1) of the ICCPR. Australia, along with other delegations including Belgium, Denmark, France, Lebanon and the United Kingdom, engaged in debate concerning the circumstances in which detention was permissible and thus not a contravention of an individual's rights. The 1948 Session of the Commission on Human Rights had suggested a clause with seven detailed exceptions including detention of aliens awaiting deportation, the detention of convicted criminals and the custody of minors by their parents.[13] The United Kingdom in 1949 submitted a further text including additional exceptions. When it was apparent that the Commission on Human Rights was unlikely to reach agreement on a detailed listing, the Australian representative, John Hood, offered compromise wording: 'No one shall be subject to arbitrary arrest or detention'.[14] The proposal was accepted unanimously.[15]

At a philosophical level, there was some questioning of the legitimacy of rights that limited freedom of expression and freedom of information. Disquiet was voiced, for instance, over a prohibition on incitement of discrimination in the UDHR. The Australian delegation agreed with New Zealand that 'incitement to discrimination' was unduly vague and might be interpreted so as to infringe the right to expression.[16] Similarly Australia abstained on a proposal that stated: '[f]reedom of speech and the press shall not be used for purposes of propagating Fascism aggression and for provoking hatred as between Nations'.[17] While affirming Australia's abhorrence of war-mongering, the delegation argued that strict censorship and legal penalties were not

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13 See UN Doc E/800, Article 9; ECOSOC OR, 7th Session, Supp 2 (1948).

14 JDL Hood, Australian representative, UN Doc E/CN.4/SR95, 10; 20 May 1949. The Australian proposal went on to allow for a list of exceptions, but was not voted on by the Commission on Human Rights: see MJ Bossuyt, *op cit*, 194.

15 MJ Bossuyt, *op cit*, 194.

16 Cablegram from Australian Delegation to the UN to DEA, 26/10/48, in NAA A 1838/1, 856/13 Pt 5.

17 Cablegram Australian Delegation to the UN, Paris, to DEA 11/11/48, in NAA A 1838/1, 856/13 Pt 5.

the preferred means of deterrence. Instead States should encourage the freest dissemination of information so as to combat such undesirable expression.[18] Despite Sir Frederick Eggleston warning the Department of External Affairs that unrestrained access to freedom of information might lead to Australia being swamped by 'news and information having a foreign slant', Australian delegates remained committed to unrestricted freedom of expression and freedom of information.[19] By way of contrast, Australia was willing to limit the scope of rights to protect existing immigration policies.

After World War Two, the Australian federal government embarked upon an ambitious programme of encouraging immigration to Australia. Reception of migrants to Australia was promoted domestically as being necessary to overcome shortages of personnel for the reconstruction process and to limit Australia's vulnerability to occupation. The dominant slogan used by the Minister for Immigration, Arthur Calwell, was that Australia must 'populate or perish'. Yet, it was a limited form of immigration that was encouraged. Racial bars instituted under the White Australia Policy[20] were continued in a modified form. Only when it became clear that an insufficient number of British residents would be able to travel to Australia to fulfil Australia's needs was an invitation extended to European displaced persons.[21] Asian and African migrants remained unwelcome. Those who received assistance for their passage to Australia were required to comply with government directions as to where to live and where to work in their first two years in Australia.[22]

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18 *Ibid.*

19 Synopsis of paper by Sir Frederick Eggleston, prepared by A Loomes of the DEA for inclusion in Draft Brief, 28/7/48, in NAA A 1838/1, Item 856/13 Pt 5.

20 The White Australia Policy is the term commonly given to the restrictive policies instituted under the *Immigration Restriction Act 1901* (Cth) to prevent persons of non-Anglo Celtic backgrounds being admitted to Australia. As to the origins of the policy, see KM Dallas, 'The Origins of "White Australia"' (1955) 27(1) *Australian Quarterly* 43.

21 Even then, the initial preference was for Europeans from the Baltic States, with Europeans from other countries being accepted in subsequent years: G Bolton, *The Oxford History of Australia, vol 5, 1942-1988*, Oxford University Press, Melbourne, 1990, 55.

22 G Bolton, '1939-1951' in FK Crowley (ed), *A New History of Australia*, Heinemann, Melbourne, 1974, 482.

In seeking to insulate these policies from international criticism, Australia consistently opposed clauses that restricted a State's ability to determine freely its immigration policy. Australia thus opposed the UDHR's recognition of a 'right of asylum'. The Department of Immigration had conveyed their concerns about such a right in no uncertain terms :

> If it is intended to mean that any person or body of persons who may suffer persecution in a particular country shall have the right to enter another country irrespective of their suitability as settlers in the second country this would not be acceptable to Australia as it would be tantamount to the abandonment of the right which every Sovereign State possesses to determine the composition of it's own population, and who shall be admitted to its territories. [23]

In the debate on the UDHR in the Third Committee of the General Assembly, the Australian delegation supported the deletion of any reference to an individual's right to be 'granted asylum'.[24] Support was given to an alternate formulation that recognised an individual's right to 'seek and enjoy' asylum without imposing any obligation on a particular State to grant asylum.[25] Similar questioning took place with respect to the implications of recognising an individual's right to nationality. Only when it became clear to the Australian delegation in Committee discussion that a State would remain free to determine the preconditions for nationality was Australian support forthcoming.[26] Even the right of men and women to marry was questioned on the basis that it might imply married couples had the right to live together in a country in which one of them was resident or eligible for admission. The Australian Mission to the United Nations was directed that only if it was made clear that the obligation extended only to not preventing such persons *leaving* a country in order to be together could the clause be supported.[27] Similarly, Australia objected to an unqualified prohibition on

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23 Memorandum from THE Heyes, Secretary, Department of Immigration to the Secretary, DEA, 17/3/48, in NAA A 1838/1, 856/13/7 Pt 1.

24 A Watt, Australian Representative, UN Doc A/C.3/SR 121, 330; 3 November 1948.

25 Report of Representative to the Third Committee on the UDHR, in NAA A 518/1; Item 104/5/2 Pt 1.

26 *Ibid.*

27 Cablegram from DEA to Australian Delegation, UN Assembly, New York, 14/5/48, in NAA A 1838/278, Item 856/13 Pt 3. Australia's failure to permit non-national spouses of Australians to remain in Australia had become a particularly sensitive issue in the wake of the O'Keefe case. In that case, Immigration officials had attempted to deport a family of eight Indonesian children whose (Indonesian) father had died and whose (Indonesian) mother had subsequently married an Australian. The High Court subsequently ruled that the O'Keefes could not be deported because of a deficiency in the administering Act: see F Crowley, *Modern Australian in Documents*, Vol 2, Wren, Melbourne, 1973, 196.

exile, fearing that it would interfere with the deportation of immigrants who had committed offences. Support was thus given to the prohibition of 'arbitrary' exiles on the basis that deportations under Australian law would not be regarded as 'arbitrary'.[28]

Australia also sought to accommodate existing restrictions placed on immigrants upon their arrival in Australia. In relation to the prohibition on slave labour, for instance, the Australian delegation supported retention of the phrase 'involuntary servitude' so as to prevent aspersions being cast on indentured labour policies, including migrants on work contracts.[29] Likewise, attempts were made to eradicate or dilute any statement regarding freedom of movement. Australia argued firstly that freedom of movement 'hardly seems to be a fundamental human right' given the number of 'natural and legitimate' restrictions upon its exercise.[30] When unsuccessful in this argument, Australian delegates sought an amendment to Article 11 of the draft Covenant to exclude the operation of immigration laws. KCO (Mick) Shann, on behalf of Australia, argued that restrictions on migrants' travel was necessary in order that Australia might assist migrants' adjustment to life in Australia and in order that migrants were directed to the areas of Australia's greatest economic need.[31] Australia withdrew its amendment (apparently when it garnered little support) and transferred its support to the Lebanese proposal to have a more generally worded limitation clause referring to 'national security, public safety or health'.[32]

Immigration policies were not the only policies to evoke such defensive drafting tactics. Indigenous policies were also jealously guarded. Under the dominant assimilationist policies of the time, indigenous persons within Australia and within Australia's external

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28 Cablegram from the Australian Delegation, UN Assembly, Paris to the DEA, 28/10/48, in NAA A 1838/1, Item 856/13 Pt 5.

29 Cablegram from the Australian Delegation to UN Assembly, Paris to the DEA, 23/10/48, in NAA A 1838/1, Item 856/13 Pt 5.

30 Statement on Article 11 made by Australian Representative, undated, text included in NAA A 1838/1, Item 856/13/7 Pt 4; Corresponding to speech of KCO Shann, Australian representative, UN Doc E/CN.4/SR 106, 3; 31 May 1949.

31 UN Doc E/CN.4/SR 106, 3; 31 May 1949.

32 UN Doc E/CN.4/56 (1949): quoted in MJ Bossuyt, *op cit*, 244.

territories were subject to severe restrictions in their daily lives.[33] Both the Department of the Interior and the Department of External Territories, for instance, were quick to grasp the possible inconsistency between equal application of human rights standards and existing policies.

The Department of Interior identified at least five of the provisions of the UDHR as problematic.[34] Concern was expressed that the policy of removing half-caste infants might be seen to be contrary to the spirit of Article 12 of the UDHR (the prohibition on arbitrary interference with privacy, family, home or correspondence).[35] Article 13 was seen as possibly impinging upon widespread restrictions on the freedom of movement of Aboriginal people in the Territory. Men and women's right to marry, recognised in Article 16, was seen as inconsistent with the need of female Aborigines to obtain the permission of an official before being permitted to marry a non-Aboriginal male. Article 21's protection of equal suffrage was recognised as being infringed by the fact that Aboriginal persons were expressly debarred from enfranchisement whilst Article 23's protection of the right to work and the right to equal pay for equal work without discrimination was potentially inconsistent with exclusions of Aboriginal persons from employment in licensed premises and the mining industry. The Department of Interior was concerned that there was no provision in the UDHR 'for action to be taken in the interests of aboriginal natives where such action would be contrary to the articles of the declaration'. However, they expressed the hope that:

> It may be that it is not intended that the articles of the declaration shall apply to persons such as aboriginal natives who have not yet reached a state of civilization where they can fend for themselves and protect their own interests.[36]

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33 As for accounts of these assimilationist policies, see P Hasluck, *Shades of Darkness: Aboriginal Affairs: 1925-1965*, Melbourne University Press, Carlton, 1988; W Sanders, 'Aboriginal Policy' in S Prasser, JR Nethercote, J Warhurst (eds), *The Menzies Era: A Reappraisal of Government, Politics and Policy*, Hale and Iremonger, Sydney 1995, 258-9.

34 Letter from JA Carrodus, Secretary, Department of the Interior, to the Secretary DEA, 3/2/49, in NAA A 1838/1, 856/13/7 Pt 2.

35 For the legislative framework concerning removal policies, see *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission, Sydney, 1997. Removal was prevalent with respect to children of Aboriginal/non-Aboriginal partnerships due to the belief that removal would assist the assimilation of the children. Children of two Aboriginal parents were considered to be beyond the help of this policy and were, like Aboriginal culture, believed to be on the road to extinction.

36 Letter from JA Carrodus, Secretary, Department of the Interior, to the Secretary DEA, 3/2/49, in NAA A 1838/1, Item 856/13/7 Pt 2.

The Department of External Territories expressed similar concerns with respect to policies it administered. Many of the restrictions operating on the inhabitants of Papua, New Guinea and Nauru were similar in nature to those applying to Aboriginal persons in Australia.[37] A number of additional clauses of the UDHR were singled out for comment. The right to seek asylum (Article 14) was questioned on the basis that territory inhabitants were subject to restricted movement. The prohibition on arbitrary arrest was also noted as being of concern (Article 9). Reference was made to legislation that applied only to 'natives' such as clothing, gambling and adultery regulations. The Department of External Territories feared that recognition of marriage rights would imply the need to disturb customary marriages and that freedom of religion might interfere with the need to regulate practices such as cannibalism. Regulation of freedom of expression was needed in order to prevent the spread of anti-government or mischievous propaganda.[38] Rather than apologising for these restrictions, they were lauded as being designed 'assist all types of people, sympathetically, through progressive stages of development'.[39]

The Department of External Affairs considered that several of these 'inconsistencies' could be easily accommodated within the human rights regime. Restrictions on cannibalism on Papua and New Guinea, for instance, were said to not infringe freedom of religion.[40] The Department of External Affairs emphasised that all rights would be read as subject to limitations necessary for public order.[41] Yet, in relation to two areas in particular, Australian policy makers toiled to limit the express human rights so as to safeguard Australia's assimilationist policies.

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37 Letter from JR Halligan, Secretary, Department of External Territories, to the Secretary DEA, 17/3/49, in NAA A 1838/1, Item 856/13/7 Pt 2. The letter considered the effect of restrictions in the *Native Labour Ordinance and Regulations 1946*, *Native Administration Regulations (New Guinea) 1924*, *Native Regulation Ordinance and Regulations (Papua) 1908-30*, and *Native Administration Ordinance 1922* and *Regulations (Nauru) Movements of Natives Ordinance* (*Nauru)* 1921.

38 Letter from JR Halligan, Secretary, Department of External Territories, to the Secretary DEA, 17/3/49, in NAA A 1838/1, Item 856/13/7 Pt 2.

39 *Ibid.*

40 The DEA rejected, for example, that outlawing cannibalism in Papua New Guinea constituted an interference with freedom of religion: Comments on Articles, undated, in NAA A 1838/1, Item 856/13/7 Pt 2.

41 UN Doc E.CN.4/SR 106; 31 May 1949.

The first area was freedom of movement. In 1949, for instance, Australia put forward an amendment to Article 11 (freedom of movement). Its amendment not only excluded immigration laws from the scope of the Article (as discussed above), but sought also to exclude laws relating to indigenous people.[42] The Australian delegate explained that restrictions on the freedom of movement of Aboriginal people were imposed 'in their interest'. Aboriginal people were described as very backward peoples whose contact with the white population 'had not always had the happiest results'. It was necessary to prevent their movement into urban areas in order to prevent Aborigines coming into contact with disease.[43] As outlined above, the Commission on Human Rights accepted only a limitation related to 'national security, public safety or health'. However, the Australian delegation considered this sufficient to remove potential inconsistency of approach, showing a preparedness to adopt a wide definition of limitation clauses.[44]

The second area concerned the application of the Covenants to the external territories *per se*. Australian policy-makers advocated the insertion of a clause that would provide for a graduated approach to the implementation of human rights in the territories. Section 35(1) of the International Labour Organisation Constitution was presented as a model approach. Section 35(1) read:

> The members undertake that conventions which they have ratified in accordance with the provisions of this constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible including any trust territories for which they are the administering authority, except where the subject matter of the Convention is inapplicable owing to local conditions, or subject to such modifications as may be necessary to adapt the Convention to local conditions. [45]

Under such a clause, States administering territories would be under an obligation to apply the provisions of the Covenant to all territories to the maximum extent possible. Non-application was permissible where the Covenant was inapplicable due to local conditions. Alternatively, application of the norms could be varied or modified to suit local conditions. It was a more moderate approach than that advanced by the United

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42 *Ibid.*
43 *Ibid.*
44 *Ibid.*
45 Cablegram from DEA to Australian Mission to the UN, 9/11/49, in NAA A 1838, Item 929/4/6 Pt 1

Kingdom who supported the total exclusion of territories from the scope of the Covenant. Yet, it still sent a message that human rights were not universally applicable to all peoples.

Notwithstanding such attempts to limit the application of rights to particular classes of persons, Australia remained committed to the inclusion of general equality and non-discrimination clauses. At one of the earliest meetings of the Drafting Committee of the Commission on Human Rights, an Australian representative, Ralph Harry, suggested a composite text to be used in the Declaration. Its opening words were:

> All men (without distinction as to race, sex, language or religion) are born free and equal and have certain inalienable rights[46]

Australia also proposed an additional text dealing with equal protection under the law and protection against discrimination. The text, submitted in 1947, read:

> Every person regardless of office or status shall be entitled to equal protection under the law and shall be protected by the law against any arbitrary discrimination and against any incitement to such discrimination in violation of this Declaration.[47]

Although Australia's support for a prohibition on 'incitement to discrimination' was not longstanding,[48] the proposal reflected an awareness that the State (through enacting legislation) needed to play a role in protecting individuals against arbitrary discrimination. Through its use of the term 'arbitrary discrimination', the proposal also made clear the Australian understanding that not all differences in treatment constituted prohibited discrimination. Indeed, it was by virtue of this understanding of 'arbitrary discrimination' that Australian policy makers felt justified in advocating equality clauses alongside clauses limiting the rights of indigenous persons – the latter representing (in their eyes) permissible distinctions rather than arbitrary discrimination.[49]

Australia's representatives were also keen to ensure that the right of non-discrimination was seen not as an independent right, but a right limited in its application to other rights

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46 RL Harry, Australian representative, UN Doc E/CN.4/AC.1/SR 13, 4; 9 June 1947.

47 UN Doc E/CN.4/SR 35, 11: quoted in MJ Bossuyt, *op cit*, 480.

48 See discussion above relating to limitations on freedom of speech.

49 In the debates on the UDHR, John Hood, the Australian delegate suggested that the term 'distinction' be used rather than 'discrimination' in the non-discrimination clause: see J Morsink, *op cit*, 94-5.

in the Covenant. EJR Heyward, as Australian representative in 1948, for instance, rejected proposals for a broad non-discrimination clause that did not refer back to the specific rights recognised in the Covenant.[50] The example put forward by Heyward in conjunction with his argument was not necessarily apt. Heyward stated that restrictions on the employment of women for health reasons involved distinctions but not the infringement of a right.[51] Other more fitting examples can be found in the Australian internal correspondence. The Department of External Affairs considered that once there was no freestanding right to asylum, Australia could not be criticised for its discriminatory entry requirements. The clear implication was that equality was not a concept to be welcomed as a freestanding right. Instead, it was to operate only with respect to recognised human rights and, even then, to apply only to unjustifiable distinctions.

Overall, Australia during the Evatt period accepted the legitimacy of the category of civil and political rights and advocated a strong role for government in ensuring such rights, even within the private sphere. Such support did not translate to acceptance of all the civil and political rights proposed – with ongoing resistance to rights limiting freedom of expression and freedom of information and those potentially interfering with domestic immigration and indigenous policies. In large part, these areas of resistance reflect the interplay of dominant (bipartisan) political pressures and Labor Party ideology. Little dissent was voiced within the Australian community to the continuation of the White Australia Policy during the 1940s. The Australian Labor Party with its traditional concern for protecting the rights of workers had little incentive to challenge restrictions on imported labour.[52] Furthermore, the conception that Aboriginal persons and the inhabitants of trust territories were at a lower stage of civilization and thus not capable of responsibly exercising rights was far from

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50 EJR Heyward, Australian representative, UN Doc E/CN.4/AC.1/SR 27, 4; 11 May 1948

51 It is conceivable that Heyward advanced this example with the understanding that the right to work was not a civil and political right and therefore the example did not involve infringing a right. It is an attenuated interpretation, however, given Australia's parallel advocacy for inclusion of a right to work in the draft Covenant. Heyward's example seems to go more to the Australian insistence that not all distinctions constituted discrimination.

52 As to the Labor Party's attitude towards the White Australia Policy, see B McKinlay, *The ALP: A Short History of the Australian Labor Party*, Drummond/Heinemann, Melbourne, 1981, 22-23.

uncommon. The Evatt period's emphasis on strong governmental intervention to ensure rights seems attributable to the Australian Labor Party's ideology. By accepting a socialist agenda, and thus governmental power to transform the economic foundations of society, Labor Party adherents such as Dr Evatt appear to have been comfortable with government intervention in a range of 'private' areas. It was not a comfort so readily apparent in later Australian policy.

II. Spender Period

During the short period in which Percy Spender was Minister for External Affairs (December 1949-April 1951), civil and political rights continued to be given only a limited amount of analysis. The terms in which such analysis was conducted reflect a somewhat ambivalent relationship with civil and political rights. At one level, Australian policy began emphasising the traditional nature of civil and political rights, promoting these rights as the West's gift to newer nations who were less conversant with the rule of law. At the same time, the number of reservations Australian delegates voiced to the wording of civil and political rights increased. In addition to the objections raised in the Evatt period relating to domestic policies and freedom of information and expression, there was heightened concern about the perceived imprecision of some of the clauses. With the Menzies government's attempts to repress communism in Australia came a greater attachment to 'national security' limitations on all rights. At a more general level, there arose resistance to obliging States to take positive action to actualise civil and political rights. Civil and political rights became equated with 'traditional civil liberties'.

The impression gained from examination of the documentation of Australian delegations in the 1950-51 period is that civil and political rights were considered largely unproblematic. The challenge facing the Commission on Human Rights was characterised as one related more to drafting than conceptualisation. For the purposes of the Fifth Assembly of the General Assembly in 1950, for instance, a supplementary

Brief was prepared on the issue of the Draft Covenant on Human Rights. With respect to the first 18 Articles (civil and political rights), it was stated:

> These articles form a coherent whole, comprising the body of traditional rights. The delegation may vote in favour of the 'general adequacy' of the articles, explaining that this vote simply expresses Australia's view that these articles satisfactorily conform to the classic pattern of civil rights.[53]

Civil rights were thus seen to be endowed with a legitimacy by their long heritage – being part of a 'classic pattern of civil rights', constituting 'traditional rights'. Even when Commonwealth lawyers were aware of the lack of legal protections for some rights, such as the right to an interpreter in criminal trials, the reaction was not to question the right itself, but to suggest that Australia's practice was sufficient in any case.[54]

A note of *noblisse oblige* crept into some of the discussions of civil rights. Notwithstanding the fact that not all civil rights were entrenched in the common law system, civil rights were viewed as reinforcing the pillar of the rule of law, and thus familiar to Western legal systems. Fred Whitlam, as Australian representative to the Commission on Human Rights in 1950, wrote for example in the following terms about the prohibition on ex post facto laws in the draft Covenant:

> This prohibition against ex post facto criminal laws is one to which those not of the 'Western' pattern of institutions attach great importance. It is apparently considered necessary in shaping, or re-shaping, their institutions of law to give specific and positive legislative force to concepts that are more or less traditional with the 'West'. [55]

In that same note, Whitlam related the nature of his discussions with the United Kingdom on this point. Regarding the United Kingdom as 'in the best position to appraise [the clause's] possible effects', he noted that while he and the United Kingdom representative perceived that the limitation on non-retrospective criminal laws would mean a theoretical curtailment of legislative power, such a curtailment would be 'no more than some possible technical inconvenience in regard to legislation and minor

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53 Brief for the Australian Delegation to the Fifth Session of the General Assembly, Supplementary Item, in NAA A 1838/1, Item 856/13 Pt 7.

54 Letter from LD Lyons, for the Secretary, Attorney-General's Department to the Secretary, DEA, 23/3/50, in NAA A 1838/1, Item 856/13 Pt 8.

55 Memorandum from HFE Whitlam, Australian Mission to the UN, NY to the Secretary, DEA, 29/5/50, in NAA A 1838/1, Item 856/13 Pt 7.

legislation at that'.[56] This inconvenience, Whitlam argued, was a small price to pay for the 'very real gain that it will represent to other countries'.[57]

Associated with the trumpeting of civil and political rights was an acceptance that civil and political rights would be legally enforceable and thus needed to be drafted with precision. Hostility was focused in particular on the use of the term 'arbitrary' in the texts prohibiting deprivation of life and arrest and detention. Without acknowledging the role Australia had played in having this term adopted, Whitlam decried the failure of the Commission to be more precise in its drafting. In relation to the prohibition on arrest and detention, for instance, Whitlam, stated:

> Individual liberty was an old and clearly defined concept, and it would be dangerous to leave out definitions which were the fruit of long experience from a legal instrument which had binding force.[58]

Whitlam thus sought the substitution of a list of situations in which State action was permissible. Even if the Commission was not minded to include such a list of situations, Australia in its written comments suggested that the term 'arbitrary' be deleted and that the clause read:

> No one shall be subjected to arrest or detention except on such grounds and in accordance with such procedures as are established by law.[59]

With respect to the attitude adopted to particular clauses, delegates under Spender continued to place high priority on removing or limiting rights that potentially clashed with migration and indigenous policies. The comments sent by Australia to the United Nations in 1950, for example, included a lengthy explanation of the Australian government's view that restrictions on freedom of movement were in the interests of

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56 *Ibid.* Whitlam was aware that the High Court had confirmed the Commonwealth's power to pass ex post facto legislation in the case of *R v Kidman* (1915) 20 CLR 425: Letter from LD Lyons, for the Secretary, Attorney-General's Department to the Secretary, DEA, 23/3/50, in NAA A 1838/1, Item 856/13 Pt 8.

57 Memorandum from HFE Whitlam, Australian Mission to the UN, NY to the Secretary, DEA, 29/5/50, in NAA A 1838/1, Item 856/13 Pt 7.

58 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 144, 16; 3 April 1950 and see E/CN.4/SR 146, 14-15; 5 April 1950.

59 Australia's comments on the draft Covenant submitted to the UN in 1950: UN Doc E/CN.4/353/Add 10 (1950). A copy is also found in NAA A 1838/1, Item 856/13 Pt 8. Note that this formulation permitted virtually unrestricted powers of arrest and detention to be exercised by the government – with the only requirement being that the powers were granted by law and exercised in accordance with the law.

Aborigines and the inhabitants of trust and colonial territories.[60] Australia pushed for a prefatory clause to the Article on freedom of movement which provided for States to enact general laws 'for specific reasons of national security, public safety or order, welfare or health or for the protection or wellbeing of women or indigenous peoples, or for immigration purposes'.[61] When Australia's proposal was not taken up by the Commission on Human Rights, Australia transferred its support to maintaining the proposed broad limitation referring to national security and public order.[62]

Similarly, Australia resisted the formation of a freestanding equality right. As in the Evatt period, Australia insisted that the right applied only in relation to the enjoyment of rights in the Covenant. Australia thus put forward a proposal to merge the draft Articles 2 and 20 (the equivalent of what is now Article 26). Its proposal read:

> Everyone shall be accorded all the rights and freedoms (defined) recognized in this Covenant without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[63]

The paragraph mentioned neither equality under the law nor equal protection of the law. Thus laws themselves did not have to embody parity of treatment, provided the laws did not regulate the exercise of human rights.

The campaign to limit the application of human rights guarantees to the inhabitants of trust territories was also maintained. In 1951, for instance, the Australian delegation proposed that the metropolitan government be able to declare at the time of ratification to which of its non-self-governing and trust territories the Covenant was to extend. Reasons would have to submitted as to why the Covenant was not to be extended to the remaining territory. With respect to such remaining territory, the metropolitan power was to be obliged to take the necessary steps for extension of the Covenant as soon as possible, subject to the consent of the territorial governments concerned where necessary for constitutional reasons.[64] The Australian vision continued to be tied to the

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60 *Ibid.*

61 *Ibid.*

62 The limitation had been discussed in 1949: see fn 32 above.

63 *Ibid.*

64 Brief for the Australian Delegation to the Seventh Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/6 Pt 3A.

belief that human rights guarantees could only be applied to persons of a particular stage of development, when they could be expected to 'responsibly' exercise such power.

The freedoms of information and expression received particular attention from Australian policy-makers. The clause containing reference to both freedoms (draft Article 19) was the one clause that attracted the attention of Spender when a draft of the Covenant was given to him in 1950.[65] By 1950, freedom of information had a high profile internationally largely as a result of the efforts of the United States. Debate centred upon the nature of restrictions that could be placed on the freedom. The United States desired a clause in broad, unqualified terms that drew upon the terms of the draft Convention on Freedom of Information. The United Kingdom supported a narrower Article that permitted regulation of these freedoms on grounds such as national security, the prevention of disorder or crime, and the desire to prevent obscenity or libel.[66] In weighing into this debate, Spender indicated a preference for a clause with tightly defined limitations such as included in the text proposed by the Australian Newspaper Proprietors' Association:

> This right shall be subject only to such limitations as are pursuant to law and are necessary for the protection of national security in time of war or declared emergency for the prevention of crime, or for the protection of the health, reputation or rights of other persons.[67]

At the same time, Spender remained concerned that a 'national security' limitation would leave the right vulnerable to abuse and would facilitate improper suppression of news items and commentary.[68] Thus, he indicated that he would like loopholes closed up as far as possible by expanding phrases such as 'such limitations as are pursuant to law' and the reference to 'war or declared emergency' to be strengthened. The

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65 Submission to the Minister for External Affairs from TG Glasheen, 30/4/50, in NAA A 1838/1, Item 856/13 Pt 8.

66 Memorandum from J Hill, External Affairs Office, Australia House, London to the Secretary, DEA, 13/3/50, in NAA A 1838/1, Item 856/13 Pt 8. Bossuyt has noted the difficulty of the drafting Committee of the Commission on Human Rights in resolving this issue, leading to the drafting Committee's putting before the Commission a variety of texts with a list of some 25 possible limitations: M Bossuyt, *op cit,* 374-5.

67 Reproduced in Brief for the Australian Delegation to the Fifth Session of the General Assembly, Supplementary Item, in NAA A 1838/1, Item 856/13 Pt 7.

68 *Ibid.*

Department of External Affairs then drafted a suggested amended text which, with Spender's additions underlined, read:

> Everyone shall have the right to be free from governmental interference to hold opinions, to seek, receive and impart information, opinions and ideas, regardless of frontiers, through speech, press, art or any other media.
>
> This right shall be subject only to such limitations as are pursuant to law and are strictly necessary
> (i) for the protection of national security in time of war or actual emergency, provided such emergency is declared, or
> (ii) for the prevention of crime or for the protection of the health, reputation or rights of other persons and enforceable through established courts of law acting in accordance with settled and public procedures.
> No limitations shall be imposed except with the concurrence of or in accordance with rules and principles determined by the competent national legislature.[69]

Later amendments to the text were made to ensure that the limitations covered the protection of official secrets, codes and cyphers outside time of war. Spender originally contemplated that the text should be submitted to the Third Committee in late 1950, but came to agree with the Department of External Affairs that detailed discussion of texts should be avoided in the Third Committee. The issue was thus discussed only in general terms by Australian delegates. Its remains of significance, however, for demonstrating the continuance of an Australian emphasis on freedom of expression and freedom of information. It also provides a sharp contrast to policy-makers' willingness to embrace broadly defined 'national security' limitations on rights in a desire to protect the Menzies government's anti-communist policies.

In 1950 the Menzies government passed the *Communist Party Dissolution Act 1950*. The Act declared the Communist Party to be an unlawful organisation and dissolved it. Under the Act, if the Governor-General declared an association or individual to be communist, such associations and individuals could be declared to be prejudicial to the defence of the Commonwealth. Associations could be dissolved, and their assets forfeited to the Commonwealth. Individuals found to be communist sympathisers would be barred from government employment and from holding office in federal unions. The Governor-General's initial determination that an association or individual

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[69] Annex A to Memorandum from Australian Mission to the UN to the the Secretary, DEA, 3/11/50, in NAA A 1838/1, Item 856/13 Pt 9.

was communist was reviewable. The subsequent Commonwealth determination that the association or individual constituted a threat to the Commonwealth was not. It was the most ambitious attack on a political movement ever attempted in Australia's history.[70] So strong was the Menzies government's determination to destroy the communist movement in Australia that when the High Court declared the Act to be unconstitutional in *Australian Communist Party v the Commonwealth*,[71] the Menzies government resolved to seek additional powers for the Commonwealth through a Constitutional referendum. Only when a majority of Australians rejected the constitutional proposal on 22 September 1951, did the Menzies government desist in their legislative efforts.

Australian policy-makers were called upon to adapt their stance on human rights to accommodate the proposed anti-communist legislation. In May 1950 the Australian Mission was warned by the Department of External Affairs that a review of the Covenant was being conducted 'in light of recently introduced Australian legislation'.[72] Copies of the *Communist Party Dissolution Bill 1950* together with Menzies' introductory statement in the House of Representatives were distributed to delegates with the instruction to 'bear these in mind' throughout consideration of the Covenant.[73] Officers of the Department of External Affairs met with officers from the Attorney-General's Department to undertake a clause-by-clause analysis of the draft Covenant in light of the legislation. The outcome of the meeting was a recommendation that 'national security' limitations be inserted into Article 8(3) (prohibition on forced/compulsory labour), Article 9 (prohibition on arbitrary arrest), Article 11 (freedom of movement), and Article 17 (freedom of expression and freedom of thought).[74] The meeting also considered the possibility of inconsistencies between the legislation and the onus of proof protection (Article 13) and the prohibition on non-

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70 See E Atkin, B Evans (eds), *Seeing Red: The Communist Party Dissolution Act and Regulation 1951: Lessons for Constitutional Reform*, Evatt Foundation, Sydney, 1992.

71 *Australian Communist Party v the Commonwealth* (1951) 83 CLR 1.

72 Cablegram from DEA to Australian Mission to the UN, 4/5/50, in NAA A 1838/1, Item 856/13 Pt 8

73 *Ibid.*

74 Internal Memorandum on Discussions in Attorney-General's Department, 19/5/50, in NAA A 1838/1, Item 856/13 Pt 7.

retrospective criminal charges (Article 14), but concluded that the proposed legislation did not infringe these latter rights.[75]

Fred Whitlam, as Australia's representative, did not publicly raise the issue of the anti-communist legislation in the Commission on Human Rights. Given that the Commission was discussing mostly economic and social rights in the 1950-1 period, his silence may not have been significant. Equally, it may have reflected a deliberate, pragmatic choice not to raise a topic of some sensitivity unless absolutely necessary. Clearly his political masters did not share any such reticence. The Prime Minister, Robert Menzies, for instance, was frank in his assessment of the overriding need to take such measures. In his correspondence with Felix Frankfurter, a Justice of the United States Supreme Court, Menzies for instance stated:

> I have felt compelled to believe that the direct and conspiratorial activities of our Communists must be met by legal forms which one would rather shun under ordinary circumstances.[76]

Despite not being raised in the public sphere, Australia's preparedness to use the veil of 'national security' to justify anti-communist legislation remains an important interlude for displaying the preparedness of Australian policy-makers to limit the definition of civil and political rights to accommodate competing political interests.

During the Spender period, one also notices a movement away from committing governments to take positive steps to protect individuals' civil and political rights. In the equality clause advanced by the Australian delegation (quoted earlier), there was no reference to any government obligation to legislate so as to prohibit discrimination. In debates in the Commission on Human Rights, Whitlam argued that discrimination would have to be eliminated through education not legislation.[77] Antipathy was expressed to clauses that involved enforceable government expenditure. Thus in relation to a right of compensation for wrongful conviction, Fred Whitlam argued in

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75 *Ibid.* The basis of this conclusion was that the legislation did not affect the onus of proof, nor was the legislation related to a 'penal offence'.

76 Letter from RG Menzies to Justice Felix Frankfurter, 20/7/51, Personal Correspondence Series 1, Menzies Collection, NLA MS 4936.

77 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 173, 13; 27 April 1950.

defence of existing Australian practice that left the question of compensation up to the Executive. Wrongful conviction was said to be a situation 'so unlikely to be other than rare' and as such a matter for the Executive to ensure a fuller and more flexible form of justice.[78] In theoretical terms, Whitlam was arguing against any enforceable positive obligations on the State in the area of civil and political rights. Australian policy was focused on supporting 'traditional' liberties – or areas of non-interference by the State. It was for the State to desist from conduct, rather than the State to take action, for civil and political rights to be respected.

To the extent that policies changed during the Spender period, the major architect of such change appears to have been Fred Whitlam, Australia's representative on the Commission on Human Rights. There is little evidence of Spender's direct intervention, nor that of other Ministers or bureaucrats. In the absence of any documentation relating to Whitlam's reasoning for adopting the stances he took, it is difficult to state a definitive cause for the change. Two factors, however, would appear to be the most likely catalysts. First, as outlined in Chapter 1, the Liberal Party under the leadership of Robert Menzies laid a great stress on 'individual freedoms'. In clause 3 of the Party's objectives, for instance, it was stated that the Liberal Party would seek to maintain the 'freedom of citizens to choose their own way of living and life, subject to the rights of others'.[79] Such a vision involved a government commitment to limiting its involvement in individual's lives. Notwithstanding the lack of direction by Spender, Whitlam may have been taking the initiative of moulding policy around his perception of the desires of his Liberal Party Minister. The fact that Spender did not see the necessity of outlining this vision points to there being a second factor at work: a shared conception by Whitlam and Spender that the archetypal human right was an individual's protection against arbitrary interference by the State.

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78 Memorandum from HFE Whitlam, Australian Mission to the UN, NY to the Secretary, DEA, 29/5/50, in NAA A 1838/1, Item 856/13 Pt 7.

79 *Forming the Liberal Party of Australia: Record of the Conference of Representatives of Non-Labour Organisations*, Canberra, October 1944, University of Queensland collection.

The source of Spender and Whitlam's shared philosophical outlook may well have been their shared legal training. Spender received his legal education at the University of Sydney, graduating in 1918.[80] Whitlam went to the University of Melbourne.[81] Each would be likely to have left law school, well versed in English constitutional history and Diceyan jurisprudence.[82] Both would have fostered a conservative approach to the identification and protection of human rights. Dicey emphasised the ultimate sovereignty of parliament. He also stressed the rule of law and the separation of powers between the monarch and the parliament as the means of ensuring that Executive power was not arbitrarily exercised. The courts developed the rules of the common law and equity in part to further protect individuals' liberties.[83] English constitutional history focused on the development of parliamentary power and the 'freedoms' respected in Magna Carta. As such, the orthodox approach to human rights would have been to ensure that 'traditional liberties' were protected by the courts, but that any codification of rights would need to be precise and respect parliament's ultimate sovereignty. Evatt, too, a graduate of the University of Sydney, would have received a similar legal training. However, for Evatt, this training was tempered by the alternate set of values to be found in Labor Party ideology. Spender's Liberal Party ideology served to reinforce his conservative training while Whitlam's sense of needing to act impartially as a public servant would also have facilitated the undiluted expression of conservative legal jurisprudence. As such, one sees in the Spender period, a coalescing of conservative paradigms supported by the prevailing Liberal Party philosophies and British legal traditions.

The Spender period is interesting for displaying the continuities and discontinuities in Australian policy towards civil and political rights. As with the Evatt periods, there was a clear comfort with recognition of civil and political rights. There was also a

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80 Resume of PC Spender, in Department of External Affairs, Statement of Service, 1950, held at the Department of Foreign Affairs and Trade.

81 Entry for HFE Whitlam in *Who's Who in Australia*, Herald, Melbourne, 1950, 752.

82 The major textbooks used in Australian law schools prior to World War Two were by British authors.

83 AV Dicey, *Introduction to the Study of the Law of the Constitution*, (10th ed) Macmillan, London, 1959, 75-77; 202-3.

desire to insulate key policies from the scope of human rights guarantees, in particular the recognition of a right to equality. With the intensification of Australia's Cold War, however, policy-makers showed an increased willingness to use 'national security' limitations to narrow the scope of civil rights. At the same time, the Liberal Party's emphasis on the individual led to a restricted vision of government involvement in ensuring rights and a conceptualisation of civil and political rights as 'civil liberties'. Many of these shifts were to be further developed during the Casey and Bureaucratic period.

III. Casey and Bureaucratic Period

During the Casey and Bureaucratic period, continued support for traditional civil liberties co-existed with intensified resistance to the scope of many of the civil and political rights proposed for the ICCPR. In a period where bureaucrats were the chief policy-makers, all of the clauses that raised the ire of Australian delegates in previous periods continued to be the subject of adverse criticism. The 'civil liberties' view of civil and political rights was further cemented leading to hostility towards clauses requiring a State to take action to facilitate individuals' enjoyment of rights. New clauses provoked concern including the introduction of clauses on the equality of men and women, children's rights and universal political rights. Opposition to an independent clause concerning the equality of men and women arose. Although in the face of international pressure Australia reversed its stance of opposition on some clauses, rarely did such reversal represent a fundamental change of heart. Thus, by the time of the finalisation of the ICCPR, Australia retained significant reservations with respect to a number of the substantive rights included in the Covenant.

As in the Spender period, the *noblisse oblige* approach to civil and political rights remained evident. Australia's policy with respect to the prohibition on retrospective laws is one example. South Australia had indicated in 1960 that it was uneasy with the prohibition given that a state might conceivably 'in extraordinary circumstances' wish

to pass retrospective legislation to deal with a loop-hole in the law.[84] Leslie Lyons of the Attorney-General's Department sought the opinion of Whitlam who dismissed South Australia's argument in terms reminiscent of his original statement on the matter:

> This is the position with every Government. The disadvantage of adopting the provision referred to is a theoretical or, at best, a technical one. It has been felt that this is a contribution which free Governments, such as the Australian Government might well make to assist in remedying a situation which obtains in countries having Governments which are less free, ie the possibility and indeed not infrequent habit, of passing ex post facto laws to dispose of or harass political rivals [85]

Likewise, Australian delegations continued to insist that powers of government had to be defined with precision. Opposition continued to be displayed towards use of the term 'arbitrary' in respect of the right to life and the prohibition on detention.[86] Only in 1958 when JE Ryan reported that a majority of countries in the Third Committee accepted use of the term 'arbitrary' did Australia accept the term.[87] There was certainly confusion as to the meaning of the term within Australian circles. When a proposal was before the Commission on Human Rights to carry out a study on arbitrary detention, the Australian delegation proposed the following definition be used:

> arrest or detention (a) on grounds or in accordance with procedures other than those established by law, or (b) under the provisions of a law the basic purpose of which is incompatible with respect for the right and liberty of person.[88]

According to this definition, detention could be arbitrary even if lawful. By 1960 when the Attorney-General's Department was providing advice on the interpretation of the draft clause prohibiting arbitrary interference with privacy, a different view was taken. Clarrie Harders of Attorney-General's expressed the view to the Department of External Affairs that 'arbitrary' would be likely to be interpreted in Australia as meaning 'unlawful' rather than 'harsh' or 'unconscionable'. Telephone tapping would thus be permissible.[89] Although Harders' comments could be read as confined to the likely interpretation to be given by an Australian court rather than purporting to offer an

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84 Quoted in letter of LD Lyons for the Secretary, Attorney-General's Department, to the Secretary, DEA, 11/10/60, in NAA A432/68, Item 68/2797 Pt 1.

85 *Ibid.*

86 A lengthy exposition of Australia's dissatisfaction with the term was included in the Australian Comments on Draft Covenant on Civil and Political Rights, July 1955; a copy of which is in NAA A 432/68, Item 68/2797 Pt 3; UN Doc A/2910/Add 2.

87 JE Ryan, Australian representative, A/C.3/SR 868, 156, 29 October 1958.

88 Letter from T Pyman to the Secretary, DEA, 20/4/56, in NAA A 432/68, Item 68/2797 Pt 3.

89 Memorandum from CW Harders, for the Secretary, Attorney-General's, Department to the Secretary DEA, 28/9/60, in NAA A 432/68, Item 68/2797 Pt 1.

interpretation at international law, there is evidence that the term 'arbitrary' was subject to varying interpretations within Australia. The insistence that civil and political rights be drafted in a precise fashion was accompanied by an unwavering policy that rights be 'realistic' and capable of immediate enforcement. As such, there was no compunction about continuing the policy of seeking to accommodate domestic policies.

As with previous periods, indigenous and immigration policies retained a sacrosanct status within policy-development Once it became apparent that the international community would not accept qualifications specifically mentioning indigenous people, Australia moved to the insertion of words of general application such as 'reasonable restrictions'.[90] Australian representatives were instructed to continue to push for deletion of the freedom of movement guarantee in 1952, though Whitlam countermanded this direction due to the potential embarrassment to Australia in the Trusteeship Council should Australia have to justify its proposal.[91] Delegates were instructed to defend Australia's policies as 'protective' rather than 'discriminatory'.[92] In relation to trust territory inhabitants, the Australian delegation continued to push for the inclusion of the inaptly named 'colonial application clause' to prevent application of the Covenant to dependent territories until admitting defeat in 1965.[93] Before the Holt government's decision to end the White Australia policy in 1966,[94] there remained concern to insulate immigration policies from external criticism.

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90 Australia made this suggestion at the 530th Meeting of the Commission on Human Rights in the context of Turkey's suggestion that the Commission carry out a specialist study on 'arbitrary arrest, detention and exile'. Australia's suggested definition detailed in letter from T Pyman to the Secretary, DEA, 20/4/56, in NAA A 432/68, Item 68/2797 Pt 3.

91 Report of the Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 2A.

92 Brief for the Australian Delegation to the 10th Session of the General Assembly, Item 28, in NAA A 462/21, Item 575/1.

93 History as reproduced in Brief for the Australian Delegation to the 21st Session of the General Assembly, Item 63, in NAA A 1838/1, Item 929/4 Pt 20; Annotated copy of submission dated 27/10/65 to the Minister for External Affairs seeking approval for Australian delegates to discontinue push for a colonial application clause in NAA A 1838/1, Item 929/4 Pt 20.

94 As to the Holt government's decision to end the White Australia Policy, see A Watt, *The Evolution of Australian Foreign Policy: 1938-1965*, Cambridge University Press, Cambridge, 1968, 201-4. The Australian Labor Party removed the White Australia Policy from its platform in 1965: Watt, 201.

Australian delegates were directed that should attempts be made to resurrect a right of asylum, Australia should remain firm in its opposition. Thus in the 1955 Brief for the General Assembly, it was stated that if any right with respect to asylum existed, it was the right of States to determine who was to be given admission to a country. Limits had to be maintained on those granted asylum. The driving force was of course, the Department of Immigration which was described in the Brief as finding 'any limitation of the right to exclude undesirable immigrants or visitors unacceptable'.[95] A right of asylum was proposed by the Soviet Union in 1960.[96] After seeking advice from Attorney-General's Department, the Department of External Affairs advised the delegation to adhere to the policy of resistance.[97]

Concern about discriminatory legislation in force in relation to indigenous persons, migrants and women motivated particular attention being given to Article 26 of the ICCPR, in particular its inclusion of a guarantee of 'equal protection before the law'. The development of policy in this area is worthy of more detailed consideration. It demonstrates the influence of international pressures on Australian policy as well as the deep-seated nature of Australia's resistance to surrendering powers to enact discriminatory laws.

Awareness of the formal discriminations embedded in Australian gender and race policies dictated Australian opposition to all but the most generally phrased non-discrimination clause up until the early 1960s. The 1955 Brief for the delegation to the General Assembly, for instance, stated without apology that many of the provisions of the two Covenants could not be applied to Aborigines or half-castes. The Department of Immigration persisted with concerns that the discrimination clause would interfere with the Commonwealth's imposition of conditions on immigration and the treatment of

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95 Brief for the Australian Delegation to the 10th Session of the General Assembly, Item 28, in NAA A 462/21, Item 575/1.

96 Note from HD Anderson, Head, United Nations Branch to RL Harry, 7/11/61, in NAA A 1838, Item 929/4 Pt 18.

97 Internal Note, Draft Covenant on Civil and Political Rights: Soviet Proposal for Article on Right of Asylum: Relation to Extradition Law of Australia, in NAA A432/68, Item 68/2797 Pt 3. Cablegram from DEA to Australian Mission to UN, NY, 8/11/61, in NAA A 432/68, Item 68/2797 Pt 1.

migrants.[98] Particularly after 1952, when efforts to have specific amendments to substantive sections such as freedom of movement were abandoned,[99] attention was re-focused upon ensuring a narrowly drafted equality provision in the ICCPR.

Australia's preference in the 1950s was to have Article 2 as the sole source of non-discrimination obligations. Such action was regarded as ensuring that non-discrimination was seen as limited to a State's fulfilment of obligations under the Covenant. Australia maintained support for this clause even whilst at the same time planning to enter a general reservation with respect to Aboriginal people and arguing for a colonial application clause to limit application of the human rights clauses to inhabitants of dependent territories. Reference to equal protection of the law was said to be potentially confusing given the lack of boundaries as to which rights were encompassed by the non-discriminatory obligation and the lack of clarity concerning how the provision would affect the content of the laws of contracting States.[100] Opposition remained consistent in the Briefs for Australian delegates to the Third Committee from 1955 until 1961. In 1961, Australia accepted Article 26 in full, though the significance of this act can easily be overestimated.

By 1961, racial discrimination had become the most prominent human rights topic discussed in the United Nations. Although the policies of South Africa attracted the greatest amount of attention, Australia's policies did not go unnoticed. The Bulgarian Chairman of the Third Committee had, at the 32nd Session of ECOSOC in November

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98 Letter of THE Heyes, Secretary, Department of Immigration to the Secretary, DEA, 19/8/55, in NAA A 1838/1, Item 856/13 Pt 15. The concern of the Department of Immigration related not only to Article 26 of the draft ICCPR, but also to Article 2 of the draft Covenant.

99 The 1952 Delegation to the Commission on Human Rights had been directed to seek a deletion of freedom of movement. Fred Whitlam reported back to the Department that he did not table any amendment to the clause given the lack of receptiveness to any amendments and the risk that any amendment would give rise to the embarrassment of Australia in the Trusteeship Council: Report of the Australian Representative to the 8th Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 2A.

100 Brief of the Australian Representative to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/9 Pt 3; See also Brief of the Australian Representative to the 10th Session of the General Assembly, Item 28, in NAA A 432/72, Item 64/3385.

1961, referred to the 'extermination of the Tasmanian aborigine by Australia'.[101] Papers authored by academics and Aboriginal activists concerning the treatment of Aborigines were being circulated to foreign delegations.[102] The Department of External Affairs was predicting that international attention to Australian Aboriginal policies could be expected to increase given the perceived communist infiltration of Aboriginal organisations and the fervour of communist and anti-colonialist delegations.[103] Initially, the Department's response was to arm delegates with 'positive information' concerning government policies on Aboriginal Australians. The Brief for the Sixteenth Session of the General Assembly (1961), for instance, included an Annex on Australian Aborigines, outlining the necessity of restrictive measures for the protection of Aboriginal peoples.[104]

Debate over Article 26, in particular, was imbued with strong racial overtones. In light of the politicisation of race, James Plimsoll of the Australian Mission in New York, was suggesting in mid-1961 that Australia should reconsider its stance on Article 26. According to Plimsoll, Australia would gain more than it would lose by voting in favour of the whole Article. It could still reserve Australia's position with respect to matters such as control of aliens and national resources, but would be seen to be supporting the guarantee of freedom from discrimination on the grounds of race.[105] Viewing the debate on the Covenant as largely political rather than juridical and doubting whether

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101 Cablegram from J Plimsoll, Australian Mission to the UN to DEA, 11/11/61, in NAA A432/68, Item 68/2797 Pt 3.

102 The Department of External Affairs showed particular awareness of the circulation of a paper by Professor Zelman Cowan undertaken for the International Commission of Jurists and a speech given by Shirley Andrews and Doreen Trainer: Memorandum from H Gilchrist to A/g Secretary, DEA entitled 'Australian Aborigines: External Affairs Interest', 29/8/61, in NAA A 1838/1, Item 929/5/3 Pt 2.

103 Brief for the Australian Delegation to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18. The Annex on Aboriginal Australians regarded the Communist Party as infiltrating existing Aboriginal welfare organisations such as the Federal Council for Aboriginal Advancement. See too Letter from ASIO to DEA, 13/5/63: in NAA A 1838/371, Item 897/31. The speech of Ms Shirley Andrews at a UN Seminar on the Role of Police was similarly dismissed as being from a 'trouble-maker' and a 'communist sympathiser': Note from WT Doig, A/g Assistant Secretary to P Shaw, NIN NAA A 1838/371, Item 897/31 Pt 1.

104 Brief for the Australian Delegation to the 16th Session of the General Assembly, Item 35 in NAA A 1838, Item 929/4 Pt 18.

105 Cablegram from J Plimsoll, Australian Mission to the UN to DEA, 11/11/61, in NAA A432/68, Item 68/2797 Pt 3.

Australia would in fact ratify the ICCPR, Plimsoll recommend that Australia support Article 26 as drafted.[106] The Department of External Affairs were not convinced that such a move was prudent given that Article 26 could be interpreted as 'requiring Australia to amend legislation involving discrimination in respect not only of aliens but also of Australian citizens, eg aboriginal voting rights, conditions of employment or women in public service'.[107] Plimsoll was thus ordered to abstain from voting on the Article.

In public, the Australian delegation sought to convey its limited understanding of Article 26. 'Equality before the law' was said to be synonymous with 'equal application of the law'.[108] Discrimination could be understood only in the context of particular situations and rights – an approach adopted in Article 2 rather than in an oblique reference to equal protection of the law.[109] After advice was sought from Kenneth Bailey (the then Solicitor-General) as to the appropriate procedure,[110] the Department of External Affairs sent a Cablegram to the delegation advising it to vote in favour of the Article, but with a statement explaining the Australian view that the second sentence of Article 26 was related to 'equality before the law'. Australia's vote for Article 26 was thus contingent on an understanding that it required simply that laws were applied equally rather than mandating laws provide for substantially equal treatment.[111]

The proper balance between State regulation and individual freedom in the areas of freedom of expression, information and opinion continued to vex Australian policy-

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106 *Ibid.*

107 Cablegram from DEA to Australian Mission to the UN, NY, 13/11/61, in NAA A 432/68, Item 68/2797 Pt 1.

108 The Australian representative, Elizabeth Warren wrote to the DEA indicating that there had been widespread agreement as to such a limited understanding of 'equality before the law': Memorandum from EA Warren for Delegation, Australian Mission to the UN, 16/11/61, in NAA A 1838, Item 929/4 Pt 18.

109 EA Warren, Australian representative, UN Doc A/C.3/SR 1101, 201-2; 13/11/61.

110 Internal Note to HD Anderson, A/g Sec, (author undecipherable), 14/11/61, in NAA A 1838, Item 929/4 Pt 18.

111 Summary of Work of Third Committee by Australian Representative to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18.

makers. The Eighth Session Brief for the Commission on Human Rights in 1952, for instance, described the draft article on freedom of opinion and expression as raising the 'almost insoluble' problem that had dominated the discussions of the Sub-Commission on Freedom of Information.[112] The problem was to find a formula that, while permitting the utmost liberality with regard to freedom of expression, also provided for restrictions that are exercised in relation to that freedom in a democratic society. Delegates were warned to avoid having a text adopted which read like a code of restrictions and was thus out of keeping with the rest of the Covenant. If possible, delegates were to seek an identical set of limitations for the right of association and the freedom of information.[113] By 1955, the Australian Brief for the General Assembly noted the difficulties in drafting the limitations, and were sympathetic to the United Kingdom's additional list of objections, but found it difficult to conceive of justifiable limitations beyond those in Article 18(3). These consisted of limitations provided by law that were necessary for the respect of the rights or reputations of others, or for the protection of national security, public order, public health or morals.

As in the Evatt period, Australian delegations resisted the imposition of broad restrictions on freedom of expression in what was to become Article 20 of the ICCPR. In relation to proposals that advocacy of national, racial or religious hostility constituting incitement to hatred or violence be prohibited, Fred Whitlam, for instance, focused on the evils of censorship and repressive police action which he claimed were 'abhorrent to the Australian way of life'.[114] Freedoms enjoyed by Australian people were said to be derived directly from resistance to the imposition of directives from above, however well-intentioned they appeared.[115] The comments submitted by Australia to the United Nations in July 1955 noted that the term 'hatred' was subjective

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112 Brief for the Australian Delegation to the Eighth Session of Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 1.

113 *Ibid.*

114 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 377, 7; 6 May 1953; See too Australian Comments on Draft Covenant on Civil and Political Rights, July 1955, in NAA A 432/68, Item 68/2797 Pt 3.

115 *Ibid.*

and so not amenable to legal regulation.[116] In the directions replicated in the Briefs for delegates to the Third Committee from 1955-1961, the objection focused on the term 'hatred'. A specific review of this aspect was carried out in 1961. All the states and Territories, except South Australia, indicated support for continued efforts to delete a prohibition on hate speech.[117] When in 1961 Brazil proposed the extension of Article 20 to include a prohibition on war propaganda, Australia's stance mirrored that of the Evatt period. The Solicitor-General described the term 'war propaganda' as 'too wide, too loose and too vague in expression...[it would] leave open the possibility of endless controversy on free-world defence arrangements'.[118] The delegation was empowered to abstain rather than oppose the amendment (if opposition would be construed as support for war propaganda), but to seek to act in concert with the United Kingdom.[119] Both the United Kingdom and Australia voted against the adoption of the amendment and clause.[120]

In opposing any obligation to legislate with respect to prohibiting hate speech, Australia was also adhering to the civil liberties view that arose during the Spender period. Government continued to be seen as having only a limited role to play in the area of civil liberties. In the area of the non-discrimination clause, Australia argued against an obligation to enact anti-discrimination legislation in Articles 2 and 26 on pragmatic and principled grounds. Since discrimination often had its origin in social prejudice, its eradication required education campaigns rather than legislation. [121] Indeed, Australia ended up abstaining on Article 2 of the ICCPR (the non-discrimination clause) on the

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116 Australian Comments on Draft Covenant on Civil and Political Rights, July 1955, in NAA A 432/68, Item 68/2797 Pt 3.

117 South Australia favoured the more extreme view of the United Kingdom that the clause should be deleted in its entirety: Letter of JS White, Secretary to the Premier of SA, quoting the Crown Solicitor, to EJ Bunting, Secretary, PM's Dept, in NAA A432/68, 68/2797 Pt 1. All the state responses are to be found in NAA A 432/68, Item 68/2797 Pt 1.

118 Filenote by LD Lyons, expressing the views of the Solicitor General, 31/10/61, in NAA A 1838, Item 929/4 Pt 18.

119 Cablegram from DEA to Australian Mission to UN, New York, 25/10/61, in NAA A 1838, Item 929/4 Pt 18.

120 Summary of Work of Third Committee by the Australian Representative to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18.

121 Brief for the Australian Delegation to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/9 Pt 3; The comment was duplicated in the Brief for the Australian Delegation to the 10th Session of the General Assembly, Item 28, in NAA A 432/72, Item 64/3385.

basis that Article 2 mandated legislative action.[122] In a limited number of situations, Australia accepted that government intervention might be necessary. Around these cases, however, the boundaries were to be narrowly drawn. Thus in relation to the right to life in Article 1 of the Covenant, Australia argued for the right to be 'protected by law' rather than protected 'by the State'.[123] At times, even minimal government involvement was the subject of domestic discontent. The Department of Immigration unsuccessfully sought to convince the Department of External Affairs to object to Article 13 of the ICCPR which provided for procedural rights for aliens facing expulsion.[124] Yet, while accepting the need for use of State resources where the State had previously intervened, Australia would not volunteer the use of resources in private affairs.

A range of new clauses also provoked trenchant criticism. The first of these was draft Article 3 which provided for the equality of men and women. It was introduced in 1952 in accordance with a directive of the General Assembly.[125] Considering Australia's opposition to an equal pay guarantee in the ICESCR,[126] it is not surprising that Australia's initial public stance was to abstain on the clause. In 1952, Whitlam reported to the Department of External Affairs that all members of the Commission eagerly endorsed the principle of equal rights, but that there was a division as to the value of a separate clause on the equal rights of men and women. Whitlam considered that the position of opponents to the clause who derided the clause as a 'charitable handout' was more logical, but out of respect for the Assembly directive, he would abstain on the draft Article.[127] By 1953, Whitlam was more forthright in his hostility to the clause. Where discrimination existed by virtue of culture, a treaty provision, he argued, would not serve to eradicate them nor was it desirable for traditions to be

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122 Memorandum to federal departments on the ICCPR, authored by P Brazil, 19/6/67, in NAA A 446/165, Item 1970/76776.

123 Cablegram from DEA to Australian Mission to the UN, 19/11/57, in NAA A 432/68, Item 68/2797 Pt 3.

124 Brief for the Australian Delegation to the 10th Session of the General Assembly, in NAA A 432/72, Item 64/3385.

125 General Assembly Resolution 421 (V), 1 December 1950, 5 UN GAOR Supp No 20, 42 (1950).

126 See discussion of equal pay in Chapter 1: 56-57, 65.

127 Memorandum from the Mission to the UN, NY to the Secretary, DEA, 27/5/52, in NAA A 1838/1, Item 856/13/10/7 Pt 2.

overriden or attempts made to change conditions that were inherent in the nature and growth of organized societies.[128] For Whitlam, the clause was an attempt to transform attitudes rather than establish a legal right. Privately, the clause led him to state:

> It even seemed to be suggested that a covenant such as that under discussion could change articles of faith and religion, but treaties like the covenants on human rights could never have an overriding effect of that sort.[129]

In the 1955 Brief for delegates to the General Assembly (the basis for instructions to delegates from 1955 until 1961), opposition to this clause continued. Such opposition was specifically linked to the issue of equal pay for equal work. The Attorney-General's Department was asked for its comments on whether opposition should continue to be expressed to this clause in 1962. Leslie Lyons, for Attorney-General's, advised that he could see no reason for departing from the 1955 Brief.[130] However, the Brief for the 1962 Session of the Third Committee of the General Assembly, whilst admitting that Australia would prefer deletion of the Article 'on technical grounds', related that it would not seem advisable to do other than support the clause. Australia did not press for deletion of the clause and thus Article 3 was adopted unanimously in 1962.[131] International pressures seem to have dictated this choice, since there is little evidence of the birth of a commitment to providing for the equality of men and women.

The scope of political rights to be included in the ICCPR was also questioned. In 1953, Whitlam wrote to the Department of External Affairs concerning the right to participate in public affairs (draft Article 25), stating:

> We have a far graver doubt as to whether such an article as has been formulated is capable of wide application, in view of the great diversity of character and function amongst organs of authority throughout the world and also the vast differences in the stages of community development amongst the peoples of the world, of which colonial territories are only one illustration. [132]

Similarly, Whitlam as Australian representative to the Commission on Human Rights voted against recognition of 'universal and equal suffrage'. He explained that he

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128 FHR Whitlam, Australian representative, UN Doc E/CN.4/SR 372, 9; 4 May 1953.

129 *Ibid.*

130 Referred to in 1964 Summary on Equal Pay Clause, in NAA A 1838/1, Item 856/13/10/7 Pt 2

131 UN Doc A/C.3/SR 1206, quoted in MJ Bossuyt, *op cit*, 78.

132 Memorandum from Australian Representative to the Commission on Human Rights to the Secretary, DEA, 8/5/53, in NAA 1838/2, Item 856/13/10/8 Pt 3.

considered a new form of expression was needed, and that a right needed properly to be an attribute of a human person rather than being dependent on the State. Since suffrage was linked to the State rather than the individual, it was not suitable inclusion in the Covenant.[133] The 1961 General Assembly Brief added that the term 'universal and equal suffrage' was inappropriate for a legal text like the Covenant. Deletion of the phrase was admitted to be unlikely given its emotive appeal.[134]

For a country like Australia which championed democratic freedoms, such a stance may appear surprising. However, it too appears to have been influenced by an awareness of racial inequalities in Australia. In Whitlam's 1953 statement concerning the right of participation, he alluded to the difficulties associated with colonial territories. The 1955 Brief for the General Assembly stated that the electoral rights were unacceptable in part because of because of restrictions on Aborigines, and inhabitants of dependent territories. Delegates were directed, however to refer in general terms to the need for most countries to make reasonable distinctions with respect to voting rights (given existing limitations on the basis of literacy, criminal conviction, and mental deficiency), so as to avoid 'unwise public reference to special situations obtaining in Australia'.[135] Only when the clause was amended to allow for reasonable restrictions on political rights, did Australian hostility lessen. Ultimately, Australia voted for Article 25 as a whole.

Concern about existing inequities with respect to Aboriginal children was also partially behind Australia's resistance to inclusion of a clause specifically recognising children's rights. Poland submitted a draft Article on the topic in 1962.[136] It provided that every child had the right to special protection by society and the State, to non-discriminatory enjoyment of rights, and the right to a name and nationality. Illegitimacy of a child was said to be an impermissible basis on which to restrict the rights of the child. The

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133 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 367, 14, 29 April 1953.

134 Brief for the Australian Delegation to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18.

135 *Ibid.*

136 UN Doc A/C.3/L 1014, quoted in MJ Bossuyt, *op cit*, 457.

Attorney-Generals' Department gave the clause a negative review. It noted that the clause did not limit itself to the rights in the Covenant, that Australian law made distinctions in relation to legitimacy (at least in subject areas outside the Covenant) and was likely to cause difficulties with respect to the treatment of Aboriginal children.[137] These comments were passed on to the Australian delegation together with the view of the Department of External Affairs that, as children were already covered by the Covenant, a specific Article would be at best, repetitive and at worst, would have the effect of casting doubt upon the application of the Covenant to other groups.[138] Within the Third Committee of the General Assembly, the Australian representative, Hugh Gilchrist spoke against the inclusion of the Article on the basis that children were granted rights by the other provisions of the Covenant. If however, the majority desired an Article, Gilchrist argued that it should be limited to relating to the rights already recognised in the Covenant.[139] Australia eventually abstained on Article 24 of the ICCPR.

In contrast to the tendency seen in Chapter 1 of Briefs of this period to seek to accommodate indiscriminately all state economic and social policies through amendments to the draft text, Briefs prepared in relation to civil and political rights reflected greater confidence in sifting through state concerns. The standard 1955 Brief and its successors listed a variety of state concerns with the clauses, particularly in the criminal justice area. However, rather than directing delegations to sponsor textual amendments, the Briefs generally directed delegates to make clear their understandings of the clauses so as to accommodate state policies. Thus, the Queensland government's worry, that prison conditions might be considered degrading, was included in the Brief with a direction that the delegation make it clear that Australia did not consider Article 7 to prohibit the ordinary condition of imprisonment upon conviction by a court.

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137 Memorandum from LD Lyons, Attorney-General's Department to the Secretary, DEA, 30/8/62, in NAA A 432/68, Item 68/2797 Pt 2.

138 Brief for the Australian Delegation to the 18th Session of the General Assembly, Item 49, in NAA A 1838/1, Item 929/4 Pt 19.

139 See Statement of H Gilchrist, Australian representative, UN Doc A/C.3/SR 1258, 10, a copy of which appears in NAA A 1838/1, Item 929/4 Pt 19.

Similarly, when New South Wales expressed concern that imprisonment for non-payment of maintenance would be regarded as an infringement of Article 11 (no imprisonment for a contractual debt), the delegation was directed to make a statement of Australia's understanding that such cases were outside the realm of the Article should the need arise. The contrast between the treatment of economic and social rights and civil and procedural rights in this respect seems to reflect the fact that advice was more frequently sought from the Attorney-General's Department as to the interpretation of civil and political rights. It is consistent with the view that civil and political rights were amenable to protection as legal rights and thus capable of being given precise definition by lawyers.

Overall, the Casey and Bureaucratic period witnessed a peak in Australia's concern about individual civil and political rights. In theoretical terms, the dominance of a civil liberties view of these rights continued. Efforts were concentrated on limiting the scope of rights to what was 'realistic' given competing domestic policies. Awareness of Australia's minority position on many rights motivated a shift on some key votes. Yet, often the shift of outward position hid a more subtle retention of reservations in the form of restrictive understandings of clauses eventually adopted.

Conclusion

This Chapter has highlighted that Australia did not give continuous support to all the civil and political rights embodied in the UDHR and ICCPR. Throughout the negotiations Australia displayed resistance to recognising civil and political rights that would undermine the discriminatory policies Australia applied to women, migrants and indigenous peoples of Australia and Australia's external territories. Although the international politicisation of racial discrimination motivated a shift in Australia's policies, rather than embracing the right of all persons to enjoy human rights equally, Australian disguised its reservations by formulating previous objections into particularised understandings.

Furthermore, only during the early years of Labor administration did Australia support government responsibility for underwriting individual's enjoyment of civil and political rights. As a result of Spender and his Ministerial successors' Liberal Party ideology and the conservative Diceyan-legal views of Whitlam and his bureaucratic successors, Australia jettisoned government responsibility for enacting protective legislation with respect to rights. The proper scope for civil and political rights was reduced to those 'traditional civil liberties' recognised in British common law systems. Confidence was expressed that in the majority of cases, recognition of civil and political rights would require little amendment of Australian practice given the Australian State's longstanding commitment to the rule of law. Where anomalies existed as a result of private action, the solution was not to insist upon governmental remedial action, but to have governments engage in more general promotion of human rights. As a result, at the conclusion of the negotiations of the International Bill of Rights, Australia viewed civil and political rights as non-threatening to the status quo, and capable of accommodating the distinct treatment of groups requiring 'special protection' in the eyes of State actors.

Chapter 3

Minority Rights and the Right of Peoples to Self-Determination

Introduction

This Chapter considers Australia's attitudes towards the right of minorities to practice their culture, religion and language embodied in Article 27 of the ICCPR and the right of peoples to self-determination proclaimed in Article 1 of both the ICCPR and the ICESCR. The rights have several features in common. Neither right has an equivalent in the UDHR, though each right has a heritage that predates 1948. Each right also involves a 'collective' element: individuals are entitled to minority rights by virtue of their membership of a relevant minority group, while the right of self-determination is expressed to be enjoyed by 'peoples'. Beyond these similarities, each right evoked considerable hostility and suspicion from Australian policy-makers during the negotiations of the human rights Covenants. Minority rights were feared as potentially undermining the existing cultural and national unity. Self-determination rights were viewed as subverting the *bona fide* administration of trust and non-self-governing territories and leading to the possible breakdown of orderly government in nation States. Whilst Australia eventually accepted a narrowly interpreted Article 27, it remained implacably hostile to any recognition of the right of peoples to self-determination.

The timing of the international discussions on minority rights and the right of self-determination does not permit a rigid adherence to the time periods used in other Chapters. Minority rights, for instance, were not discussed at any length in the Commission on Human Rights during the Spender period (1949-1951). Debates concerning a right of self-determination arose only during 1950 and thus by-passed the Evatt period (1946-1949). Yet, the unevenness of the international discussion is

counteracted to a certain extent by the degree to which internal debate on the rights overlapped. Self-determination, for instance, was seen initially as a form of minority right. One can thus use the discussion of each right as part of a larger narrative on Australia's attitude towards race-based collective rights. In adopting this broader perspective, it becomes apparent that unlike the findings in Chapters 1 and 2, political affiliations played little role in determining Australia's continuous opposition to such rights. Instead, policies were informed by a bipartisan belief in the supremacy of the Anglo-Celtic culture and a hostility towards affording 'special rights' to groups within Australian society.

A. Minority Rights

Overview of the International Debate

The international community's concern with the protection of minorities has a long heritage.[1] In peace processes involving the redrawing of territorial boundaries between neighbouring States, a subsidiary effect was the creation of ethnic, linguistic and cultural minorities. Groups of persons who had previously been living in one State became citizens of another by virtue of being residents of the territory that was transferred. The international community recognised that such persons were likely to be vulnerable given their lack of historic association with the new State, and their likely distinct language, culture and ethnicity. Pressure was placed upon States acquiring territory to provide guarantees with respect to such minorities. Attention was focused particularly on protecting minorities from discrimination in such key fields as citizenship, the freedom to move and establish residence and the exercise of culture, language and religion. A clause to protect minorities was thus included in the peace treaty of Westphalia (1648) as well as the treaties following both World Wars.

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1 For a fuller history, see: M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, Strasbourg, 1993, 480; Y Dinstein, 'Collective Human Rights of Peoples and Minorities' (1976) 25 *International and Comparative Law Quarterly* 102, 113; P Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford, 1991.

During the drafting process of the UDHR, the Soviet Union, Yugoslavia and Denmark each put forward proposals for an Article dealing with the rights of minorities. After negotiations, a combined text was produced which stated:

> All persons irrespective of whether they belong to the racial, national or religious minority or majority of the population have the right to their own ethnic or national culture to establish their own schools and receive teaching in their native tongue and to use that tongue in the press, at public meetings, in the courts and in other official premises.[2]

The emphasis of this text was on the right of each individual to use his/her own language in all aspects of public life. When debated in the Commission on Human Rights, it was apparent that delegations varied in their opinions as to the extent of diversity that States should accept in public life. In the absence of agreement as to an acceptable form of clause, no minority rights clause was adopted. Instead, in 1948 a draft Resolution was submitted to the General Assembly for its consideration. The Resolution, subsequently adopted by the General Assembly, proclaimed that the international community could not 'remain indifferent to the fate of minorities'.[3] It requested the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to prepare a detailed study of the problems of minorities as a basis for putting in place effective measures of protection.[4]

From the earliest debates of the ICCPR, a minorities clause was on the negotiating table. The Human Rights Division of the United Nations Secretariat prepared a clause for possible inclusion in the Covenant in 1947. It read:

> In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of an equitable proportion of any public funds available for the purpose, their schools and cultural and religious institutions and to use their own language before the courts and other authorities and organs of the State and in the press and in public assembly.[5]

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2 Note too that the Secretariat had proposed a section: 'In States inhabited by a substantial number of persons of a race, language or religion other than those of the majority of the population, persons belonging to such ethnic, linguistic or religious minorities shall have the right to establish and maintain, out of an equitable proportion of any public funds available for the purpose, their schools and cultural and religious institutions and to use their own language before the courts and other authorities and organs of the State and in the press and in public assembly': UN Doc E/CN.4/21, annex A, Art 46. Each text is quoted in MJ Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, 493.

3 GA Resolution 217/C (III), quoted in M Nowak, *op cit*, 483.

4 *Ibid.*

5 UN Doc E/CN.4/21, Annex A, Article 46, quoted by MJ Bossuyt, *op cit*, 493.

Pursuant to the General Assembly's 1948 Resolution, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities resolved not to prepare an additional study, but to submit a draft Article to the Commission on Human Rights for inclusion in the Covenant. The text it submitted in 1950 read:

> Persons belonging to ethnic, religious, or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[6]

As a draft, it was written as a prohibition against State interference with a group's right to enjoy culture, religion or language, rather than a directive mandating the State to facilitate the continuation of culture, religion or language. This soft tone did not win the approval of all proponents of a minority rights clause. When the major debate on the provision commenced in 1953, the Soviet Union put forward an alternative text obliging a State to *ensure* national minorities the right to use their native tongue and to possess schools, libraries, museums and other cultural and educational institutions.[7] Yugoslavia similarly required the State to guarantee ethnic and linguistic groups the right to be educated in one's own language.[8] At the end of its Ninth Session (1953), the Commission on Human Rights adopted an amended version of the text submitted by the Sub-Committee which stated:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their own group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[9]

It was not until 1961 that the Third Committee of the General Assembly focused on this clause. The text proffered by the Sub-Commission was adopted without amendment at the end of the 16th Session of the General Assembly and adopted by the General Assembly as part of the finalised Covenant in 1966.

I. Evatt Period

From the earliest discussions of a minority rights clause, Australian delegates were vocal in their opposition. The fervour of their hostility was fuelled by fears that such a

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6 This is the Sub-Commission's proposal as contained in E/CN.4/641, Annex II, Recommendation II, quoted in MJ Bossuyt, *op cit*, 493-4.

7 UN Doc E/CN.4/L222, quoted in MJ Bossuyt, *op cit*, 495.

8 UN Doc E/CN.4/L225, quoted in MJ Bossuyt, *op cit*, 495.

9 UN Doc E/CN.4/SR 371, 6; quoted in MJ Bossuyt, *op cit*, 494.

clause would interfere with Australia's policy of expecting migrants to assimilate to the 'Australian way of life'. Attachment to assimilationist policies was particularly strong amongst Australian policy makers given the expansionist immigration policies after World War Two. Assimilation was seen as the only policy that would guarantee social cohesion and prevent the fracturing of society in the face of the reception of so many migrants from diverse cultures. As has been averted to in Chapter 2, the post-war period in Australia was indeed remarkable for broadening the racial base of Australia's migrant intake and, accordingly, Australia's demographic make-up. As Geoffrey Bolton has noted Australia remained overwhelmingly British at the end of World War Two.[10] Culturally, it perceived itself as homogenous. Identification was with Anglo-Celtic norms of culture with Aboriginal cultures being largely ignored. The 'populate or perish' immigration campaign aimed at increasing Australia's population by 1% a year – approximately 70 000 persons.[11] Given that a majority of these persons (66%) were assisted migrants of non-British origin,[12] Australians (and Australian politicians) feared that permitting cultural diversity would lead to a breakdown of the Australian social fabric.[13] In any case, it was assumed that the Australian (Anglo-Celtic) culture was superior to other cultures so that retention of other cultures was regarded as undesirable in itself. Despite the fact that restrictions on recently arrived assisted migrants created a segregated, congregated group, the official Australian policy was to encourage the dispersal of immigrants. Enculturation and assimilation were to be the means by which immigrants in Australia could progress. As a result, any international attempt to encourage persons to maintain diverse languages or cultures was firmly resisted.

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10 G Boulton, *The Oxford History of Australia, Vol 5: 1942-1988: The Middle Way*, Oxford University Press, Melbourne, 1990, 53.

11 See CA Price, 'Overseas Migration to Australia: 1947-1970' in C Price (ed), *Australian Immigration: A Bibliography and Digest*, Australian National University, Canberra, 1970, A3.

12 *Ibid*, A4.

13 Surveys overwhelmingly showed a preference for migrants of British stock: a 1948 survey revealed 63% of respondents favoured English migrants whereas the comparable figure for Greeks was 8%, Italians, 4% and Germans 14%: cited in S Alomes, M Dober, D Hellier, 'The Social Contract of Post-war Conservatism' in A Curthoys, J Merritt (eds), *Australia's First Cold War: Vol 1: Society, Communism and Culture*, Allen and Unwin, Sydney, 1984. These authors conclude that 'Images of disease, or at least dirt and smell, of race and of evil were common in popular perceptions of migrants. Their colour, their foreign tongues and their food tastes all seemed different and therefore threatening to many Australians of Anglo or Celtic origin': *ibid.*

Primarily as a result of this attachment to assimilationist migration policies, Australia launched a broad ranging attack on the minorities clause proposed for the UDHR. When the joint Soviet Union, Yugoslavian and Danish text was submitted for the consideration of the Commission on Human Rights, Australia voted against the clause.[14] John Hood, the Australian delegate, described the draft Article as raising a problem 'which directly affected the fundamental structure of States, and the science of government, that of reconciling the rights and interests of all groups within the State'.[15] Specifically not questioning the wisdom of 'free development of diversified groups in other countries', Hood defended Australia's stance that assimilation of all groups was in the 'best interests of all in the long run'.[16] The Australian situation was distinguished from that of other European nations. European nations had *pre-existing* minority groups as a result of the historical re-drawing of boundaries and the involuntary integration of ethnically distinct groups. In such contexts, it might be appropriate to speak of minority rights, particularly with respect to protecting political rights. Australia, however, was a country of recent immigration in which persons of different ethnic backgrounds volunteered to come to Australia. The unspoken assumption was that in choosing Australia as their new home, immigrants had renounced their former political and cultural allegiances and committed to 'becoming Australian'. Accordingly, Hood argued that a minority rights clause in the Australian context would only serve to create divisions and undermine the policy of assimilation.[17]

Clauses that provided for multiple official languages were the subject of particular criticism. In the debates in late 1948 in the Third Committee, Alan Watt, as Australian representative, stated that Australia did not recognise any fundamental right to use a

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14 Cablegram from Australian Embassy, Paris to DEA, 28/11/48, in NAA A 1838/1, Item 856/13 Pt 5.
15 JDL Hood, Australian representative, UN Doc E/CN.4/SR 73, 10; 15 June 1948.
16 *Ibid.*
17 Report by Representative to the Third Committee of the General Assembly concerning the UDHR, in NAA A 518/1, Item 104/5/2 Pt 1.

language other than the national language before a tribunal.[18] English was, and would remain, the only official language.

Australian delegates also questioned the precision of the proposed clause. In particular, the delegation claimed the term 'minority' was unclear. In countries of immigration, the delegate asked would the descendants of immigrants who demanded the right to use their own language be considered as a minority?[19] Without himself proffering a definition of the term 'minority', the Australia's representative, Alan Watt, implied that the answer was no. Ambiguity in the term 'minority' was also used to bolster the argument that a minorities clause would have a limited operation in Australia. Delegates claimed that Australia did not have minorities. Migrants were assimilated so that they did not become minorities. Indeed, the only Australian experience of minorities was said to be of an indirect nature: during World War Two, German propaganda had encouraged racial stereotyping and the Australian government had moved quickly to suppress such material.[20] It is noticeable that the delegate did not refer to other policies of the Australian government – such as the internment of Australian citizens who were of German or Japanese ethnic origin during the war or the racially distinct treatment of Aboriginal persons.[21] Instead, Australia was presented as a country of racial and cultural homogeneity.

Internally, there was greater recognition of the existence of minorities within Australia. The Department of Interior advanced the view that Aboriginal people could be regarded as a minority.[22] Yet, so radical a proposition did the Department of External Affairs view this proposal, that it did not address the Department of Interior's position in the

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18 The delegate did, however, suggest that perhaps a separate Convention would be the appropriate venue in which to discuss the language question: A Watt, Australian representative, E/C.3/SR 161, 725-6; 27 November 1948.

19 A Watt, Australian representative, UN Doc E/C.3/SR 161, 725-6; 27 November 1948.

20 *Ibid.*

21 The ignoring of Aboriginal people was consistent with the departmental view that they did not constitute a minority. As for the internment policies instituted, see P Hasluck, *The Government and the People, 1939-1941*, Australian War Memorial, Canberra, 1952, 593.

22 Memorandum from WA McLaren, Secretary, Department of the Interior to the Secretary, DEA, 19/5/47, in NAA A 1838/1, Item 856/13/7 Pt 3.

Briefs. Instead, all that was included was a statement that the Department did not consider Aboriginal peoples to constitute a 'minority' in the relevant sense. In the light of justifications given for special laws to assist Aboriginal people to reach 'higher standards' of civilization,[23] the assumption of the Department of External Affairs appeared to be that the Aboriginal people did not possess the type of 'culture' necessary to gain minority status at international law.

Beyond Australia's objections to the phrasing and utility of a minority rights clause was a stated preference for human rights clauses of more general application. Australian representatives sought the substitution of a clause that guaranteed the universal application of human rights to all, rather than the recognition of special rights for migrants. Notwithstanding Australia's parallel attempts in other fields to limit the application of substantive rights to immigrants (discussed in Chapter 2), Australia suggested that a statement along the lines 'individuals belonging to special groups should enjoy the rights granted to all human beings' should be inserted elsewhere in the Covenant.[24]

Ultimately, the Australian delegation supported the omission of any minority rights clause.[25] Deferral of the matter was considered the best solution available. Australia thus voted for the 1948 Resolution of the General Assembly expressing 'concern' for minorities. Even this step was obviously regarded as requiring justification within Australia. In an attempt to placate domestic concern over the General Assembly even implicitly endorsing rights for minorities, the Australian delegation wrote to the Department of External Affairs drawing particular attention to the General Assembly's recognition of the sensitivity and complexity of the issue. With some satisfaction, it cited the General Assembly Resolution's preamble: 'Considering that it is difficult to adopt a uniform solution of this complex and delicate question [ie minorities] which has

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23 See Chapter 2, 78.

24 JDL Hood, Australian representative, UN Doc E/CN.4/SR 73, 10; 15 June 1948.

25 Cablegram from Australian Embassy, Paris to DEA, 28/11/48, in NAA A 1838/1, Item 856/13 Pt 5.

special aspects in each state in which it arises.'[26] The issue was not to be raised again in any detail until the Liberal-Country Party Coalition had gained power in Australia.

II. Spender Period

There was little agitation on the minority right clause during the Spender period. The debate in the Commission on Human Rights on the form of clause finished in 1948. The new stage for its discussion in 1949-1950 was the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. One of the members of the Sub-Commission, William MacNamara, was Australian. Yet this of itself did not involve the Department of External Affairs or Australian Ministers in the Sub-Commission's deliberations. Members of the Sub-Commission were understood to participate in their personal rather than (national) representative capacity, thus MacNamara was not subject to government direction. Indeed the Department of External Affairs was far from enamoured with MacNamara and the Sub-Commission's stances. In 1950, when making a submission to Spender as to whether Australia should nominate another Australian for membership of the Sub-Commission (on the expiry of MacNamara's term of appointment), the Department of External Affairs advised against nominating another Australian. The Sub-Commission was described as having been created for political reasons to appease countries such as the Soviet Union and was seen as duplicating the work of the Commission on Human Rights. The Sub-Commission was described as operating on an 'enclave philosophy' (separating out ethnic groups) antithetical to the dominant 'assimilation policy' adopted by the international community.[27] It was noted that MacNamara had caused the government embarrassment through his support of resolutions concerning Aboriginal and migrant issues in Australia. Spender followed the recommendation of the Department and did not nominate a replacement for MacNamara. Australia thus had no official participation in

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26 *Ibid.*

27 Ministerial Submission, 'Election of an Australian to Minorities Sub-Commission', 21/3/50, in NAA A 1838/1, Item 856/13 Pt 8.

discussions on a minority rights clause until Commission on Human Rights resumed its examination of the issue in 1953.

III. Casey and Bureaucratic Period

From 1953 until 1961, Australia's stance remained one of unflinching opposition to a minority rights clause in the ICCPR. Australia's first line of attack was to dispute the existence of any relevant minorities in Australia. Secondly, it disputed any 'minority problem' existing in Australia and thirdly, argued that the inclusion of a minority rights clause would serve to produce divisions and limit national progress in States such as Australia. Essentially, Australia's three pronged attack repeated arguments used during the Evatt period. However, there was some re-ordering of arguments to emphasise the absence of minority difficulties in Australia. This change reflected a growing defensiveness in Australia's policy that was eventually to lead to the reversal of Australia's vote on the clause.

The non-existence of 'minorities' in Australia received greater emphasis in the statements of Australian representatives during 1953-1961 than had previously been the case. In 1953, for instance, Fred Whitlam, as Australia's representative in the Commission on Human Rights, gave a speech concerning the Yugoslavian and Soviet Union proposal for a minority rights clause. Whitlam identified the two groups most likely to be classified as 'minorities' in Australia – Aboriginal people and immigrants – and disputed the eligibility of either to be properly regarded as minorities. Whitlam argued that Aboriginal people had no competing culture of their own 'since they had only reached the level of food-gatherers'. As such, they could not be considered a minority.[28] Likewise with immigrants, there was 'no question of cultural differences'.[29] Australia explained its point of view more fully in 1954 during the Economic and Social Council's discussion of the work of the Sub-Commission on the Prevention of

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28 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 369, 10; 2 October 1953.

29 *Ibid.*

Discrimination and Protection of Minorities. In that forum, the Australian delegate advanced the view that 'minorities' did not include immigrants who had assimilated, a view endorsed by Argentina, Belgium, Venezuela and Yugoslavia.[30] This stance had not changed as of 1961. In the 1961 Brief for the General Assembly, in addition to referring to Whitlam's 1953 statement, the Brief concluded that migrants were not 'minorities' but equal citizens.[31]

A majority of Australian states clearly agreed with the Department of External Affairs that minorities were undesirable. Yet, they were more diffident in expressing their views as to whether minorities existed in Australia. In 1952, the Commonwealth requested all the states to provide information to be used in a response to the United Nations Sub-Commission about the protection of minorities in Australia. The Department of External Affairs referred the states to the definition of 'minority' which was being utilized by the United Nations, namely:

> (a) The term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population;
> (b) Such minorities should properly include a number of persons sufficient by themselves to develop such characteristics; and
> (c) The members of such minorities must be loyal to the State of which they are nationals.[32]

Only New South Wales unequivocally saw itself as having no minorities in the relevant sense.[33] Tasmania and Victoria were more evasive in their responses. Victoria stated that there was no legislation or judicial decision dealing with the position of minorities without tackling the issue of whether minorities existed.[34] Tasmania similarly avoided

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30 File Note relating to the 17th Session of the Economic and Social Council, undated, in NAA A 1838/1, Item 856/13/10/9 Pt 1.

31 Uruguay proposed the addition of a second paragraph to make clear that immigrants were not included: 'such rights may not be interpreted as entitling any group settled in the territory of a State, under the specific terms of its immigration laws to request special privileges or to form within that state separate communities which might impair its national unity or security': UN Doc E/CN.4/L260.

32 Quoted in letter from Minister Paul Hasluck, for Prime Minister Menzies, to the Premier of NSW, 14/2/52, in NAA A 462/21, Item 575/1.

33 Letter from JJ Cahill, Premier of NSW to Prime Minister Menzies, 21/4/52, in NAA A 462/21, Item 575/1.

34 Letter from JGB McDonald, Premier of Victoria to Prime Minister Menzies, 24/3/52, in NAA A 462/21, Item 575/1.

the issue by stating that it had no need under its democratic system for measures to protect minorities. It did comment that:

> Non-dominant groups in the population are not encouraged in preserving their original ethnic or linguistic traditions, but are expected to adopt the personal and religious freedom obtaining in this State and eventually acquire full rights as members of their chosen country.[35]

Queensland felt the need to explain its perception that it had no minorities. The Deputy Premier of Queensland, Jack Duggan, stated that those of non-British stock had not made any 'real effort to preserve or develop their own culture or tradition' whilst Aboriginal natives lacked the 'capacity to develop their own culture and traditions in a way which would enable them to take their place as ordinary members of the community'.[36] Western Australia accepted that it had legislation dealing with minorities, specifically legislation concerning Aborigines and Jews.[37]

Likewise Commonwealth departments, other than the Department of External Affairs, displayed caution about the 'minorities question'. The Attorney-General's Department considered that minorities in the sense of distinctive population groups had not appeared in Australia. At the same time the Attorney-General's Department thought that the Economic and Social Council might be interested in measures dealing with migrants, implying that the Economic and Social Council might take a different view of the scope of the term 'minority'.[38] It also considered that questions about Aboriginal peoples might arise.[39] The Department of Immigration did not see itself as playing any role with respect to minorities who owed allegiance to the Commonwealth. It accepted, though, that in so far as the Department of Immigration dealt with aliens in Australia, it was dealing with minority groups.[40] Notwithstanding this level of uncertainty amongst

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35 Letter from R Cosgrove, Premier of Tasmania to Prime Minister Menzies, 25/2/52, in NAA A462/21, Item 575/1.

36 Letter from JP Duggan, for the Premier of Queensland to Prime Minister Menzies, 16/7/52, in NAA A 462/21, Item 575/1.

37 Letter from R McLarty, Premier of Western Australia to Prime Minister Menzies, 9/4/52, in NAA A 462/21, Item 575/1.

38 Quoted in letter from KCO Shann, for the Acting Secretary, DEA to the Secretary, Department of Immigration, 8/8/52, in NAA A 1838/1, Item 856/13/1/2 Pt 2.

39 Memorandum from LD Lyons for the Secretary, Attorney-General's Department to the Secretary, DEA, 3/3/52, in NAA A 1838/1, Item 856/13/1/2 Pt 2.

40 Memorandum from THE Heyes, Secretary, Department of Immigration, to the Secretary, DEA, 19/5/49, in NAA A 1838/1, Item 856/13/7 Pt 3.

departments and states as to the meaning of the term 'minority', the Department of External Affairs publicly maintained a consistent line that the term had little application in Australia.

The second argument that Australian delegates advanced was that there was no 'minority problem' in Australia. It would have been open to Australian delegates to present this conclusion as a natural corollary of their first argument. If there were no minorities in Australia, there could be no minorities problem (unless a lack of minorities was itself considered detrimental). Instead, delegates proceeded to analyse the situation faced by Aborigines and migrants, implicitly conceding that a majority of the international community might view these groups as minorities. In relation to Aboriginal people, Whitlam accepted that the introduction of a foreign culture in Australia had created some problems in terms of fitting Aboriginal people into the general way of life in Australia, but characterised the Australian policy of assimilation as the 'sensible solution'. In relation to immigration, Whitlam asserted that differing religious beliefs caused no dissension and again spoke in favour of the policy of assimilation.[41] Despite having argued that Australia's immigration gave rise to no distinct cultural groups, Whitlam applauded the way in which Australian authorities were working to ensure that the cultural contributions that immigrants could make would not be lost either to themselves or to the Australian population as a whole.[42]

Australia's third argument was that recognition of minority rights would have a detrimental effect on States like Australia. The articulation of minority rights would have the effect of *creating* national minorities. Such artificially created minorities would in turn prevent assimilation and the development of Australia as a cohesive nation. The real difficulties arising out of immigration were seen as linguistic in nature, the inability of immigrants to immediately communicate with others in Australia. The proposals being put forward by the Soviet Union and Yugoslav

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41 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 369, 10; 2 October 1953.
42 *Ibid.*

representatives (providing schooling and public documentation in the range of languages of minority groups) were characterised as counter-productive.[43] Separate language facilities were looked upon as a disincentive for 'new Australians' to learn English and assimilate into the Australian way of life.

All three arguments were developed from a State-centric perspective. Australia considered what effect a minority rights clause would have on the State – as in the members of the community as a collective. There was little engagement with the issue of whether it was in the interests of individuals within the groups most commonly regarded as others by 'minorities' to enjoy specialised rights. The State interest in the perpetuation of assimilationist policies was regarded as so strong as to make individual interest in maintaining diverse cultures a negligible consideration. In this respect, Australia's policy on minority rights was unlike its policy on any other individual human right (with the exception of self-determination discussed later in this Chapter). As seen in Chapter 2, for instance, in debating the scope of the equality clause, Australian policy-makers accepted the overall value of freedom from discrimination while seeking limitations to accommodate competing domestic policies. In the case of the minority rights clause, the State interest in preserving cultural unity was seen as so vital as to justify opposition to any clause, howsoever worded.

Furthermore, underlying the opposition to the minority rights clause was a questioning of the value of collective specialised rights. Special rights were seen as having the potential to destabilise society and create divisions. Australia's preference remained for human rights to be drafted in such a way as to be potentially applicable to all persons. It was a position that did not alter significantly even when Australia ultimately accepted the clause.

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[43] *Ibid.* A similar argument was outlined in the Brief for the Australian Delegation to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18.

In 1961 Australia reversed its position by voting in favour of the draft of Article 27 of the ICCPR. This change reflected more a change of tactics than a fundamental change of heart. Support for a minority rights clause was specifically linked to a narrow understanding of the language employed in the draft clause. Australia minimised the significance of the distinction between a majority and a minority. In the 1961 Brief for Delegates, for example, support for the draft clause was said to be justified on the basis that the clause provided 'positive freedoms for all'.[44] Australia remained insistent that it did not have minorities and remained committed to preventing the creation of minorities. Elizabeth Warren, the then Australian representative on the Third Committee of the General Assembly, for instance, affirmed that Australia remained committed to preventing immigrants from forming migrant groups. It aligned itself with Brazil and Chile in stating:

> As one of the world's newer countries, Australia was concerned to promote national unity and a sense of national identity. It was therefore doing its best to encourage new immigrants not to set up separatist minority groups, but to merge completely with the Australian community and enrich it with their ideas, cultures and traditions. There were no barriers in Australia against newcomers worshipping according to their own creed, or using their native language.[45]

Warren was also explicit in continuing to deny that Aboriginal people could ever be considered a 'minority' group.[46] Thus the clause was seen as having little specialist application in Australia.

Australia's support for Article 27 was also conditioned upon an essentially privatised view of Article 27. According to the Brief given to the Australian delegation in 1961, Article 27 permitted immigrant groups to enjoy the language, religious traditions and culture that they brought with them, thereby enriching Australian life. In addition to conceding the right had special application to immigrant groups, the Brief demonstrated a belief that the rights to be protected fell within the private sphere – a groups' own use of language, practice of religion. There was no conception that Article 27 would apply

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44 Brief for the Australian Delegation to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18.

45 EA Warren, Australian representative, UN Doc A/C.3/SR 1103, 214; 14 November 1961.

46 *Ibid.*

in the public sphere or indeed require government assistance.[47] Thus minority rights were viewed more in the nature of a 'freedom right' than a right requiring active steps by government.[48] The Australian delegation was directed to remain vigilant against any attempt by the Soviets to reintroduce obligations on the State to provide schools and other institutions for national minorities on a linguistic basis. Australia could countenance protecting individuals' right to speak their language of choice in the privacy of their home. Yet it was not prepared to underwrite the establishment of a multi-lingual State.[49]

It is likely that the Australian change of heart was motivated by a perception that in the racially-charged atmosphere of 1961 (discussed in Chapter 2), Australia would lose more than it would gain by persisting in its opposition. Should it vote against a clause that others viewed as having particular significance for Aboriginal and migrant groups, Australia would be vulnerable to the charge that it was acting in a racist manner. The preferable alternative was to vote in favour of the clause, but emphasise that its application was universal (ie all peoples enjoyed this right) and that it operated primarily in the private sector. By reading down the clause in this manner, Australian delegates felt confident that the clause would offer no threat to Australia's assimilationist policies.

Looking as a whole at Australian policy towards Article 27 of the ICCPR, it is apparent that successive Australian policy-makers remained hostile towards acceptance of a specialised collective right to enjoy cultural rights. Minorities themselves were seen as an unattractive, destabilising feature of other States, Australia having no real minorities. Policy makers were determined to uphold the supremacy of the Anglo-Celtic culture and defend it against dilution from foreign influences. Australia's opposition to this

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47 Brief for the Australian Delegation to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18.

48 Brief for the Australian Delegation to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/9 Pt 3.

49 Brief for the Australian Delegation to the 16th Session of the General Assembly, in NAA A 1838, Item 929/4 Pt 18.

collective right was to have clear parallels to the stance adopted with respect to the right to self-determination discussed in the second half of this Chapter.

B. Self-Determination

Australian opposition to the right of peoples to self-determination was another constant in Australian international human rights policy from the right's first appearance in 1950 until the finalisation of the Covenants in 1966. As early as 1953, some policy-makers opined that Australia's continued opposition was ineffective, 'like pulling faces in a dark room'.[50] Yet delegates were not authorised to withdraw Australia's objections. Indeed so great was the Australian resistance to a right of self-determination that Australia's representatives made specific adverse comment about the right in their speech welcoming the finalised Covenants in 1966.[51] Viewed from a modern perspective, Australia's resistance might have been expected to be linked to concern about the implications of Aboriginal self-determination.[52] An examination of Australia's stance reveals other dominant concerns related to Australia's administration of trust and non-self-governing territories and the potential for the right to be used by minorities to demand a right to secede.

Overview of the International Debate[53]

Self-determination was not itself a novel concept to the international community.

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50 Note from A Marshall to TA Pyman, DEA 29/4/53, in NAA in NAA A 1838/2, Item 856/13/10/8 Pt 1.

51 RF Osborn, Australian representative, UN Doc A/C.3/SR 1455, 479-80; 12 December 1966.

52 Australian representatives have in recent years expressed concerns about the use of the term 'self-determination' in the Draft Declaration on the Rights of Indigenous Peoples. In the negotiations of the Working Group on the Draft Declaration held in late 1998, for instance, the Department of Foreign Affairs 'made clear the Australian Government's concerns about the use of the term...given that it has no settled meaning and for many implies establishment of separate nations or separate laws': Department of Foreign Affairs and Trade, *Human Rights and Indigenous Issues Newsletter*, No 8, February 1999.

53 For a more detailed account of the history of self-determination, see A Cassese, *Self-Determination of Peoples*, Cambridge University Press, Cambridge, 1995, H Hannum, *Autonomy, Sovereignty and Self-Determination: the accommodation of conflicting rights*, University of Pennsylvania Press, Philadelphia, 1990, C Tomuschat (ed), *Modern Law of Self-Determination*, Martinus Nijhoff, Dordrecht, 1993.

Article 1(2) of the United Nations Charter, for instance, proclaimed that one of the purposes of the United Nations was:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.[54]

With the drafting of the International Bill of Rights emerged a debate as to whether the self-determination of peoples constituted a human right. For reasons that are not clear, this debate did not arise in the context of the UDHR, but only several years into the drafting of the Covenant on Human Rights.[55] In 1950 the Soviet Union proposed a clause for the Covenant which stated:

> Every people and every nation shall have the right to national self-determination. States which have responsibilities for the administration of non-self-governing territories shall promote the fulfilment of this right, guided by the aims and principles of the United Nations in relation to the peoples of such territories.[56]

In the Third Committee of the General Assembly, the Soviet proposal was rejected without consideration of its merit.[57] Afghanistan and Saudi Arabia re-introduced the topic in the subsequent session of the General Assembly with the result that the General Assembly ordered the Commission on Human Rights to 'study ways and means which would ensure the rights of peoples and nations to self-determination and to prepare recommendations accordingly'.[58] The failure of the Commission to prepare recommendations by the Sixth Session of the General Assembly incurred critical comment from the General Assembly. The General Assembly then adopted a more specific Resolution, directing the Commission to include an article on self-determination.[59] The text suggested by the Commission was relatively simple: 'All peoples shall have the right of self-determination'. The General Assembly also directed that the right should make special reference to the responsibility of States having

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54 As to the weakness of the principle conceived at San Francisco, see A Cassese, *op cit*, 40. According to the Committee which drafted principles concerning self-determination, it did not, for instance, give rise to a right of minority groups to secede nor did not it give colonial people a right to achieve political independence: A Cassese, *op cit*, 40.

55 A right to self-determination was not included in the UDHR, an omission that has not been explained by commentators: see, for example, J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999. The omission was not commented upon in Australian reports.

56 UN Doc E/CN.4/237. The proposed clause went on to speak of rights of national minorities. See too UN Docs E/CN.4/350, 47; A/C.3/L 96, E/CN.4/L21: all quoted in A Cassese, *op cit*, 48

57 A Cassese, *op cit*, 48.

58 GA Resolution 421D (V); quoted in M Nowak, *op cit*, 10.

59 GA Resolution 545 (VI), quoted and discussed in M Nowak, *op cit*, 10.

responsibility for non-self-governing territories to promote the realization of the right in relation to the peoples of such territories.[60] By this stage the General Assembly had decided in favour of two Covenants. As in indication of the perceived importance of the clause, the Commission on Human Rights was directed to include the self-determination clause in both Covenants.[61]

Notwithstanding these quite explicit directions, the inclusion of a self-determination clause remained a hotly debated topic in the Commission on Human Rights. A majority of the drafting work took place during the Eighth Session of the Commission on Human Rights in 1952. At this point, in addition to recognising the right and its application to trust territories, the text was expanded to include a reference to the economic aspects of self-determination. In particular, the draft clause made reference to self-determination including permanent sovereignty over natural wealth and resources and asserted that no people could be deprived of its own means of subsistence on the ground of any right that may be claimed by other States.[62]

In 1955, a small working group of the Third Committee of the General Assembly redrafted the article. It is notable that none of the so called metropolitan powers (those responsible for administering trust or non-self-governing territories) participated in this working group. The group consisted of El Salvador, Greece, India, Pakistan, Brazil, Poland, Costa Rica, Venezuela and Greece. It drafted an Article that was submitted to the Third Committee in General Assembly.[63] Whilst debates continued on the form of implementation appropriate for the right of self-determination, the text of Article 1 was finalised following the Third Committee's consideration of the Working Party's draft in 1955. The language adopted then was identical to that adopted in 1966. The clause

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60 *Ibid*; See also Report of the Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 2A.

61 M Nowak, *op cit*, 10.

62 The third paragraph of text was the result of a Chilean proposal to include the right to control natural resources: A Cassese, *op cit*, 49.

63 Report of Australian representative to the 10th Session of the General Assembly, in NAA A 432/72, Item 64/3091.

stated:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The process of drafting the clause on self-determination was interlinked with the development of recommendations concerning implementation of the right of self-determination. The Seventh Session of the General Assembly in 1952 was presented with two draft recommendations from the Commission on Human Rights. The first made reference to the existing 'slavery of peoples and nations' and directed that States with responsibility for non-self-governing and trust territories grant the right of self-determination to inhabitants upon their demand for self-government. In order to determine the popular wish of inhabitants, administering powers were to hold plebiscites under the auspices of the United Nations. The second recommendation suggested that governments administering non-self-governing and trust territories should include in the information transmitted to the United Nations (under Article 73(e) of the Charter) detailed information on the extent to which the right of self-determination was being exercised by the peoples of the territories and the progress being made to develop the capacity for self-administration. When the recommendations were debated in the Third Committee of the General Assembly, the reference to 'slavery' was removed from the first recommendation, but the substance of the recommendations was approved.

In 1954, the Ninth Session of the General Assembly requested the Commission on Human Rights to complete its recommendations on international respect for the right of peoples and nations to self-determination. Its Resolution referred to recommendations 'concerning their [peoples'] permanent sovereignty over their natural wealth and

resources, having due regard to the rights and duties of States under international law and the importance of encouraging international cooperation in the economic development of under-developed countries'.[64] The response of the Commission on Human Rights was to finalise a text of the right to self-determination and transmit it to the General Assembly for its consideration. As noted above, the text was then finessed by a Working Group of the Third Committee of the General Assembly and subsequently adopted as part of the ICCPR and ICESCR.

In none of these recommendations was there any hint that self-determination was anything but a right. Indeed, even before the finalising of the ICCPR and ICESCR, the General Assembly had taken further steps to recognise and promote the right of self-determination within the general context of decolonisation. Both the General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Resolution 1514 (XV)) and its 1962 Resolution relating to Permanent Sovereignty over Natural Resources (GA Resolution 1803 (XVII)) specifically mentioned the right to self-determination. Despite this history, Australia remained resolutely against recognition of a right to self-determination. The discussion below explores this opposition, from the starting point of the Spender period when a right of self-determination was first raised in the Commission on Human Rights.

I. Spender Period

The Australian reaction to the proposed 'right of self-determination' in 1950 was swift and unequivocal. Australia identified strongly with other metropolitan powers[65] in challenging the legitimacy of the right. In comparison to its stance in later years, Australia's public statement in 1950 appears somewhat muted. The major Australian speech given in the context of the Commission of Human Rights was relatively short

64 A Cassese, *op cit*, 49.

65 Metropolitan powers were the States who had responsibility for administering trust or non-self-governing territories. Australian reports usually listed the United Kingdom, the United States, France, Belgium, and New Zealand as fellow metropolitan powers: see for example, Social Committee Report, undated, 'UN-Australia Delegation to the General Assembly' Folder, Evatt Collection, Flinders University.

and endorsed previous speakers rather than offering an independent analysis. Yet the brevity of the statement seems to have been a consequence of the timing of the Australian speech (following most of the other metropolitan powers on the Commission) rather than disinterest. The Australian delegate was happy to endorse the arguments of the United Kingdom: self-determination was a principle and not a right and that metropolitan powers were exercising power responsibly in their respective territories.

The Australian delegation did not pause to consider whether self-determination could be conceptualised as a human right. Instead, it reacted defensively, expressing frustration and indignation that the self-determination proposal was designed to discredit metropolitan powers:

> The proposal typifies the extreme and ungoverned attitude that many delegations, particularly Middle Eastern, have brought to bear on the question of the Covenant in the Third Committee. It was used by its supporters mainly as a stick for belabouring the metropolitan powers yet again. It is the success attending these and similar efforts that has made the amended text of the draft resolution something of a monstrosity.[66]

Only when it became apparent that support for the right to self-determination was not dissipating did the Australian policy-makers develop more sophisticated lines of attack.

II. Casey and Bureaucratic Period

In the period 1951-1955, Australia continued to argue against recognition of the right of self-determination in its formal comments in the ongoing debates and in the official comments it lodged with the United Nations. In 1952 and in 1955, the issue was viewed as sufficiently important to warrant the Australian objections being articulated by (Sir) Percy Spender who was by then the Australian Ambassador to the United States.[67] Even when Australian delegations were noting the subsidence of anti-colonial

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66 Memorandum from Australian Mission to the UN, NY to the Secretary, DEA, 1475, in NAA A 1838/1, Item 856/13 Pt 9.

67 Percy Spender was made Australian Ambassador to the United States in 1951.

sentiment in the Commission on Human Rights, [68] Australia remained implacably against recognition of the right. In 1966 when the final texts of the ICCPR and ICESCR were adopted, Australia voted against inclusion of Article 1 in each Covenant.

Australia challenged the recognition of the right of self-determination on at least four bases. First, self-determination was said to be properly characterised as a political principle rather than a right. Secondly, if self-determination was a right, it was a collective right and was inappropriate for inclusion in international instruments concerned with individual rights. Thirdly, the imprecision of the clause made it a dangerous clause for an international listing of rights. Fourthly, by including an expanded reference to self-determination, the drafters of the Covenants were usurping the proper function of the community of nations in law-making. In putting forward these objections, Australian representatives reiterated their support for the political principle of self-determination in accordance with the United Nations Charter but expressed the view that due respect for the range of individual human rights and respect for the responsibilities administering countries exercised under the UN Charter would prove a sufficient means of addressing concerns of anti-colonial States and avoid corrupting the nature of the human rights covenants.

The primary basis of the Australian objection to Article 1 of the ICCPR and ICESCR was that self-determination was simply 'not a right'. Instead, it was and always would be a political principle applicable only in the circumstances prescribed under the United Nations Charter. One of the finest expositions of this argument was the speech given by Fred Whitlam in the Commission on Human Rights in April 1952.

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68 Report of the Australian Representative to the 11th Session of the Commission on Human Rights in NAA A 432/72, Item 64/3090: In this report the Australian Representative notes the subsiding of criticisms against colonial powers or at least the comparative silence regarding colonial powers' policy which contrasted with the virulent attacks against Soviet imperialism. The Report of the Australian Delegation to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/9 Pt 3 also noted the conciliatory attitude of the sponsors of self-determination, though attributed it to their confidence that their resolutions would be accepted by a majority of delegations.

At the 255th meeting of the Commission on Human Rights, Whitlam objected than an attempt was being made to transform a political concept into a broad-ranging legal right.[69] Advocacy for the clause was described as propaganda 'not in its secondary and rather perverted sense, but in its best and primary sense'.[70] Whitlam explained that proponents of the clause were seeking to use the Covenant to broaden existing international law concerning States' commitment to self-determination. Submitting to this request, he argued, would do violence to the Covenant because it would introduce a non-legal commitment into the Covenant. The Commission needed to be zealous to distinguish between legal commitments and non-legal commitments in order to avoid lessening, or appearing to lessen respect for the institution of law. Self-determination was not such a legal commitment but a 'political concept to which only political sanctions were applicable.' Had self-determination been regarded as a human right, it would have been included in the UDHR and the fact that it was not demonstrated its nature as a political concept.[71]

Sir Percy Spender's speech at the 647th meeting of the Third Committee articulated objections to the legitimacy of self-determination's characteristation as a right in a similarly robust fashion. Without any equivocation, Spender stated that self-determination was a political or moral principle rather than a legal right in the sense of other rights in the draft covenants. Having stated this, he hastened to add that Australia was a firm supporter of the principle of self-determination, attributing Australia's independence to respect for the principle:

> Australia owed its presence in the UN to evolution from a completely dependent colonial status to completely independent nationhood and approached the question for self-determination with sympathetic understanding.[72]

Significance was attached to the statement of Mr Askoul of Lebanon in disclosing the 'real motivation' of supporters of self-determination: namely, to force an advance on

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69 Reported in Memorandum from Australian Mission to UN, NY to the Secretary, DEA, 22/4/52 in NAA A 1838/1, Item 856/13/16 Pt 1.

70 Recommendations on Self-Determination: Australian statement, 23/4/52, in NAA A 1838/1, Item 856/13/10/7 Pt 2A; a Summary report can be found at UN Doc E/CN.4/SR 265, 8; 23 April 1952.

71 Australian Statement on Self-Determination, 16/4/52, in NAA A 1838/1, Item 856/13/10/7 Pt 2a; A summary record can be found at UN Doc E/CN.4/SR 255, 4ff; 16 May 1952.

72 Sir Percy Spender, Australian representative, UN Doc A/C.3/SR 647, 115, 28 October 1955.

the obligations in the United Nations Charter. Whereas the Charter obligation has been assumed by members in a collective sense, inserting a provision in the Covenant would impose an obligation on the individual State. The alternative suggested by Spender was to include reference to the 'general principle of self-determination' in the draft Covenants. This would represent a 'seed that would grow', but would not seek to usurp the law making functions of the community of nations.[73]

This primary objection to the right of self-determination was repeated in the last formal (written) comments Australia submitted to the United Nations. In its July 1955 Note Verbale, Australia stated simply:

> Self-determination is referred to in the Charter as a principle. It is nowhere referred to as a right.[74]

In making a distinction between rights and principles, none of the Australian representatives provided further elucidation between the two. The point was thought to be self-evident. Rights were intended to be enforceable whereas principles were not. Rights empowered individuals whereas principles guided States. In drafting the Charter and including a reference to the principle of self-determination, the international community had decided that self-determination should not be a right but a principle. Having been settled by international consensus, its characterisation should not be re-opened for discussion.

The second basis of Australia's objection to self-determination was that it was distinguishable from other rights in the Covenant. Australia in its 1955 official comments, for instance, remarked that even if self-determination was regarded as a right, it would have to be regarded as a collective right and thus inconsistent with the 'object and pattern of this Covenant' on individual rights.[75] Furthermore, self-determination was not capable of implementation in the same form as other rights. In 1951, Whitlam warned that a right of self-determination was 'inappropriate for

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73 Memorandum from Australian Mission to UN, New York to the Secretary, DEA, Memo 503/52, 17/4/52, in NAA A 1838/1, Item 856/13/10/7 Pt 1.

74 Australian comments on Draft Covenant on Economic, Social and Cultural Rights, July 1955, in NAA A 432/68, Item 68/2797 Pt 3; UN Doc A/2910/Add 2.

75 *Ibid.*

inclusion in a Covenant which deals with the rights of individuals in a manner designed to enable enforcement'.[76] In making this argument, no account was taken of Australia's parallel policy on economic and social rights. As outlined in Chapter 1, by the early 1950s, Australian policy was moving towards the promotion of economic and social rights as aspirational goals. Such a policy could have been adopted in relation to self-determination. Instead, a more hardline opposition to the recognition of a right of self-determination was adopted.

The third basis of Australia's objections, and one which took on increased importance once the General Assembly directed that a clause be included in both Covenants, was that the language being used to delineate the scope of the right was inappropriate. In 1955 Percy Spender described the Article as drafted as being expressed in language that 'was obscure and in some places even contradictory'.[77] Self-determination was difficult to define and impossible to set forth in legal terms.[78] Definitions of terms could not be taken for granted, Spender argued. Particular critical attention was reserved for the nebulous, but distinct, terms 'peoples' and 'nations'. Fred Whitlam also singled out the text's coverage of disposal of resources. Without challenging the central idea of sovereignty over resources, Whitlam complained that the concept of self-determination was being expanded into a novel area:

> The result was that the idea, as it had been hitherto conceived, had been burst wide open and there was no indicated limit to its extension...It had been well said that ideas are weapons. So they could be. But weapons, if carelessly handled, could be dangerous to the users, and the Australian delegation would urge that, as a weapon, 'self-determination' be not handled carelessly.[79]

A final objection raised was what might be termed a jurisprudential attack on the scope of powers permitted to the drafters of the Covenants. Whitlam reminded delegates to

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76 Cablegram from DEA to Australian Delegation to GA, Paris, 10/12/51, in NAA A 1838/1, Item 856/13/7 Pt 2.

77 Sir Percy Spender, Australian representative, A/C.3/SR 647, 115; 28 October 1955.

78 Note by UN Branch on Netherlands opposition to Art 1 of both draft Covenants, in NAA A 1838/1, 929/4 Pt 19.

79 Recommendations on Self-Determination: Australian Statement, 23/4/52, in NAA A 1838/1, Item 856/13/10/7 Pt 2A; a summary record is at UN Doc E/CN.4/SR 265, 8; 23 April 1952. Sir Percy Spender in 1955 was also to express concern that the reference to economic self-determination would discourage investment: Sir Percy Spender, Australian representative, UN Doc A/C.3/SR 647, 115, 28 October 1955.

the Commission on Human Rights that the United Nations Charter had already set the limits of the operation of self-determination in the Charter.[80] According to Whitlam, in making special provision for non-self-governing and trust territories in the Charter, the international community had already established the ground rules for the administration of territories. The immediate application of self-determination was inconsistent with this scheme. Indeed self-determination was dealt with in a separate part to administration of territories.[81] To provide for a wider application for self-determination, Whitlam argued, would be to extend beyond the proper powers of any United Nations body. It would be to legislate for the States, a power in fact beyond the United Nations. The United Nations was not an international State but an organisation of sovereign States. The Commission could only act as a functional Commission and should resist entering what the Egyptian representative had referred to as the 'greener pastures of politics'.[82] Spender in late 1952 echoed this sentiment in depicting recognition of the right of self-determination as an attempt to change the base rules upon which States had agreed in the Charter, stating:

> The Charter is a covenant which we have all accepted in good faith, and in reliance on its terms as interpreted accurately and reasonably, and to distort it and confuse it will, I fear, be a step along the road to its destruction.[83]

It was also included as the third point in the objections stated by Australia in its 1955 Note Verbale which read: '[t]he transformation of the principle of self-determination into a justiciable right in the terms of Article 1 would violate Article 2(7) of the Charter.'[84]

In advancing this fourth argument, the Australian delegation was asserting that should the Commission or General Assembly persist in its efforts to recognise a right of self-determination, it would be trespassing into the area of domestic jurisdiction covered by

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80 Recommendations on Self-Determination: Australian Statement, 23/4/52, in NAA A 1838/1, Item 856/13/10/7 Pt 2A; a summary record is at UN Doc E/CN.4/SR 265, 8; 23 April 1952.

81 *Ibid.*

82 *Ibid.*

83 Statement by Sir Percy Spender, Third Committee of GA, Self Determination, 14/11/52, in NAA A 1838/342, Item 929/4/4 Pt 2.

84 Australian comments on Draft Covenant on Economic, Social and Cultural Rights, July 1955, in NAA A 432/68, Item 68/2797 Pt 3; UN Doc A/2910/Add 2.

Article 2(7) of the Charter.[85] Self-determination matters, on this view, were not a matter of proper international concern. Instead they involved delicate matters of State policy that came within the discretion of the State. It was a view of Article 2(7) and domestic jurisdiction that involved fixed boundaries – or at least the permanent inclusion of some subject areas. Self-determination was a matter forever entrenched in the field of 'domestic jurisdiction'. No concession was made that the process of negotiating treaties permitted changes in the dominant rules between nations and thus a narrowing of concerns considered of purely 'domestic concern.'

Linked with the Australian opposition to a collective right to self-determination was an insistence that the application of existing human rights would be sufficient to protect the political interests of those in trust and non-self-governing territories. Notwithstanding its simultaneous promotion of a colonial application clause (discussed in Chapter 2) , the right of self-determination was presented as a duplicating, complicating factor. Individual political rights paved the way for political action whereby peoples could organise and determine their own government, including an independent government.[86] In 1953, an Australian delegate to the General Assembly argued that recognition of the right to self-determination was unnecessary. The Covenants would create obligations to respect individual rights. If people were sufficiently mature politically, they would be able to determine their form of government through exercise of such rights. Thus the delegate's statement:

> If these individual rights are respected, the way is then open for political action through which peoples can organise and determine their own form of government...if these rights are respected, the principle of self-determination becomes a political possibility. If these individual rights are not respected then talk of self-determination becomes but empty phrases.[87]

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85 Article 2(7) of the Charter provides 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'. Australia's increased reliance on a narrow view of Article 2(7) is dealt with in Chapter 7.

86 KCO Shann, Australian representative, UN Doc E/C.3/SR 400, 320-321; 23 January 1952.

87 Statement in Explanation of Australia's Vote on Self-Determination, 17/11/53, in NAA A 1838/1, Item 856/13.

The Australian delegation was prepared to consider compromise proposals where they directed attention back to the United Nations Charter's understanding of self-determination. In 1951, for instance, the United States sent a proposal to Australia that a separate Article be included in the Covenant dealing with self-determination as a principle rather than a right. The United States' suggested addition to the preamble consisted of the following text:

> the principle of self-determination is applicable to peoples who have already organised as independent States as well as with respect to peoples who have not yet attained a full measure of self-government. That is, there is an obligation on all States to respect peoples already organised as independent States and the right of these States to maintain their free political institutions free of external pressures, threats, subversive activities or the use of force contrary to the purposes and principles of the Charter.[88]

Trevor Pyman of the Department of External Affairs and Fred Whitlam met in December 1951 to discuss the United States proposal. They acknowledged that it would be difficult for Australia to object to something which in form was a restatement of the principle in the United Nations Charter 'and in regard to which the Australian performance was far higher than that of many of the other adherents'. They proposed, therefore, to vote in favour of the proposal whilst retaining their doubts as to the purpose to be served by a simple re-affirmation of the principle.[89] In April 1952, the text the United States put forward had been amended to refer to the 'right of self-determination', albeit with the direction that the right was to be:

> promoted and realized as provided in the Charter of the United Nations, in accordance with constitutional processes, and with proper regard for the rights of other states and peoples.[90]

The Australian delegation indicated to the Department of External Affairs that they proposed to vote in support because it was 'the least unacceptable', noting that the United Kingdom and Belgium were inclined to support it.[91] In the ensuing debate,

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88 Statement on US Proposal on Self-Determination, 17/4/52 attached to Memorandum from Australian Mission to UN, New York to the Secretary, DEA, Memo 503/52, 17/4/52, in NAA A 1838/1, Item 856/13/10/7 Pt 1.

89 Minute of Meeting between HFE Whitlam and T Pyman, 17/12/51, in NAA A432/20, Item 54/3779 Pt 6. Note also that Australia supported the United Kingdom's suggested recommendation which affirmed the principle of self-determination whilst making it clear that the principle was not intended to interfere with or affect the orderly and gradual process of the attainment of self-government under Chapter XI or Chapter XII of the Charter: Text of Statement by Australian representative in Third Committee Concerning Proposals on Self-Determination, 28/11/52, in NAA A 1838/342, Item 929/4/4/4 Pt 2.

90 *Ibid.*

91 Cablegram from Australian Mission to the UN to DEA, 17/4/52, in NAA A432/20, Item 54/3779, Pt 7.

Australia indicated its preference for the United States' version whilst maintaining its opposition to the inclusion of any clause.[92]

Support was also given to all diversionary mechanisms to remove self-determination from the agenda of the Commission on Human Rights and the Third Committee of the General Assembly. Thus Australia was prepared to vote in favour of a United States proposal for an analytic study of self-determination by a Sub-Committee of the Commission on Human Rights.[93] The Secretary-General's proposal to have a small Committee draft principles relating to self-determination that could be used by United Nations bodies was also endorsed, though doubts were expressed at to whether it would be accepted or prove useful.[94] Even when it became apparent that the right of self-determination was not going to be deleted from the Covenants, Australia presented the right as a stumbling block to its acceptance of the Covenants, a theme continued into the speech of the Australian delegate welcoming the finalisation of texts for the ICCPR and ICESCR:

> It will be clear from the statements made by the Australian Delegation at the various meetings of the General Assembly which have been concerned with the Covenants, that there are several points of detail in the Covenants which will require further study by the Australian Government by way of example, I might mention the lack of definition in the reference to a right of self-determination in Article 1 of both Covenants.[95]

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92 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 258, 9; 19 April 1952.

93 Australia objected only to one feature of the United States proposal, namely the study of the applicability of self-determination to 'peoples and nations who have been by force or subversion deprived of their right to exercise it'. For the full text of the proposal and Australia's response, see Cablegram from DEA to Australian Mission to the UN, NY, 7/3/55, in NAA A 432/68, 68/2797 Pt 3. Support was given to the proposal despite opposition from Paul Hasluck, the then Minister for Territories: see Letter from Paul Hasluck, Minister for Territories, to RG Casey, Minister for External Affairs, 1/4/55; in NAA A 1838/1, Item 856/13/10/10 Pt 2; and opposition from the United Kingdom: Submission to the Minister concerning the Request of the High Commissioner for the United Kingdom to Discuss Attitude towards Self-Determination, 28/3/55, in NAA A 1838/1, 856/13/10/10 Pt 1. In the Third Committee, as it was evident to the United States that there was not majority support for the study, the proposal was not submitted but only referred to in a general way in the United States speech: Cablegram from Australian Consulate-General (Geneva) to DEA, 19/4/55, in NAA A 432/72, Item 64/3090.

94 Copy of speech of the Secretary-General Before the Third Committee, SG 443, 11/10/55, in NAA A 432/68, Item 68/2797 Pt 3. The DEA had initially considered that the Secretary-General should be dissuaded from making a personal intervention, questioning both the utility and the legitimacy of such intervention: Cablegram of DEA to Australian Mission to the UN, NY, 5/10/55, in NAA A 432/72, Item 64/3090; See too Note on Self-Determination, 30/9/55, in NAA A 432/68, Item 68/2797 Pt 3.

95 Reported in Cablegram from Australian Mission to the UN, New York, 12/12/66, in NAA A432/68, Item 68/2797 Pt 3.

The righteous tone of Australian delegates hints at the emotive nature of the debate for Australian policy-makers. Recognition or non-recognition of self-determination was not simply an academic exercise. The fate of the clause was seen as having significant implications for Australia. The clause needed to be resisted through all possible arguments. At the same time, care had to be taken to avoid drawing attention to Australia's vulnerabilities in the area of administered territories. On the whole, therefore, Australian delegates preferred objections based on the jurisprudence of human rights, rather than speaking directly of the tension between Australian administration policy and the clause.

Australia's sense of vulnerability arose as a result of the increased international scrutiny of its policies in trust and non-self-governing territories in the 1950s and 1960s. After World War Two, Australia had sole administering authority over Papua and New Guinea, and shared responsibility with New Zealand and Britain for the administration of Nauru.[96] Australia was facing attacks on its policies not only in the Third Committee and the Commission on Human Rights , but also in the Trusteeship Council. In 1952, for instance, the Philippines, China, the USSR and Syria made adverse comment in the Trusteeship Council concerning Australia's fulfilment of its obligations under Chapter XII of the Charter. Their remarks included criticism of the alleged inadequacy of the representation on non-indigenous inhabitants in the New Guinea Legislation Council, the low level of wages in New Guinea and Nauru, the relegation of Nauruans to the background in the interests of phosphate production, and the failure of Australia to set time limits with respect to granting stages of independence in these territories.[97] In 1955, El Salvador attacked Australian policies in Nauru in the Third Committee, alleging that the phosphate deposits were being exploited to the point of exhaustion such that the inhabitants would lose their only natural resource and be obliged to abandon the island in less than 50 years time. John Hood, as Australia's representative

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96 As to Australia's responsibilities, see: N Harper, D Sissons, *Australia and the United Nations*, Manhattan Publishing Company, New York, 1959, 69-77.

97 Report of the Trusteeship Council, undated, but post October 1952, 'UN-Australian Delegations to the General Assembly' Folder, Evatt Collection, Flinders University.

in the Third Committee was able to quote favourable findings of the Trusteeship Council to counter El Salvador's charge.[98] However, Australian sensitivities remained acute.

Australia took particular offence at the equation of administration of trust territories with the oppression of colonised nations. In his speech in 1952, Spender indicated how personally Australia took the Resolutions on self-determination being proposed for the General Assembly with the statement: '[n]o one can be expected to lie down and be sniped at forever without some human impulse to retaliate in kind.'[99] His first objection was to the reference to slavery in the first 1952 resolution:

> The implication of the definition is that persons are in fact 'owned' for the selfish interests of the owner. We in Australia have ever since our beginnings stood for fair play to individuals no matter who they are, and resent the implication of a resolution which, of course, involves ourselves.[100]

More substantially, the Resolution was said to be based upon a misconception of the relationship between metropolitan power and administered powers. That relationship, he argued, consisted of the administering power giving assistance to the inhabitants of the territory, whether that be of a technical, moral or material type. The aim of the assistance was to facilitate the inhabitants eventually being able to stand alone in the modern world and decide realistically on their future. Australia was not exploiting the territories but helping to bring them nearer the goal of self-government. The terms 'colonisation' or 'colonial methods' should not be considered to be automatically or exclusively linked with the exploitation of oppressed people. Spender quoted from legal commentaries concerning the United Nations Charter[101] to provide support for his view that trusteeships were designed to assist peoples to reach the stage of development whereby they could make a choice as to their future. In the absence of territories reaching that stage of development, there was no immediate justification for changing

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98 JDL Hood, Australian representative, UN Doc A/C.3/SR 675, 256, 29 November 1955.

99 Statement by Sir Percy Spender, Third Committee of GA, Self Determination, 14/11/52, in NAA A 1838/342, Item 929/4/4 Pt 2.

100 *Ibid.*

101 Specifically Spender quoted from Bentwich and Martin's text, *A Commentary on the Charter of the UN* (1950) and Hans Kelsen's *The Law of the United Nations: ibid.*

those territories' status.[102] Finally, Spender reiterated his frustration at being called to defend Australian trust territories. He described the unpleasant experience of being brought before the bar of the United Nations:

> with a jury not wholly free of prejudice, our legal argument ignored, our liberal and democratic performances disregarded, are, if this resolution is carried, condemned by implication of engaging in slavery and other crimes.[103]

The call for recognition of self-determination was also viewed by Spender as being (at least in part) ideologically motivated. Thus in describing the potential of a right of self-determination to fragment States, Spender noted that this development would be welcomed by the Soviet Union and would 'be used in the interests of world communism'.[104] Similarly, calls for plebiscites were seen as related to the desire to destabilise States rather than assist the inhabitants of trust territories:

> If for example – and this is by no means a remote example – a minority group of subversive agents are to be permitted to agitate, apart from wasting the time of the United Nations with persistent demands for a plebescite, the result would be lamentable, and may even, in a primitive country such as Papua or New Guinea, be extremely dangerous and contrary to the interests of the people themselves. Moreover, as we know, agreement on the holding of a United Nations plebescite does not always mean that it will automatically take place, even when the right to the free exercise of self-determination has been agreed on all sides.[105]

From an examination of the correspondence between the Department of External Affairs and the Australian Mission prior to discussion of the Resolutions, it would appear that the Department was prepared to adopt a less hardline approach to the Resolutions than were the delegation. The delegation in November 1952 foreshadowed its intention of not voting for any Resolution containing a specific reference to trust or non-self-governing territories that equated self-determination with self-government or referred to the holding of UN plebiscites in territories upon demands for self-government without including safeguards for administering powers' authority.[106] In response the Department of External Affairs replied that it would be content for the delegation to adopt a more conciliatory position. The Department did not share the

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102 *Ibid.*
103 *Ibid.*
104 *Ibid.*
105 *Ibid.*
106 Cablegram from Australian Mission to the UN, NY to DEA, 25/11/52, in NAA A 1838/1, Item 856/13/16 Pt 1.

delegation's misgivings about mentioning an obligation on those administering non-self-governing territories to promote self-determination. Nor did it object to references to plebiscites provided the plebiscite option was merely an alternative means of ascertaining the wishes of the people of the territories or nations. For the Department of External Affairs, the most important factor was that it was made clear that the administering government had complete discretion to choose between widely defined alternative options in light of the particular circumstances of the territory or nation.[107]

The delegation's persistence with the harsher stance seems attributable to the strong views held by the delegation's leader, Percy Spender. Although there is evidence that the Minister for External Affairs, Richard Casey, approved Australia's general opposition to self-determination in 1951[108] and 1955,[109] there is no surviving evidence showing his view on the Resolutions. As an ex-Minister for External Affairs, Spender may have been particularly sensitive to attacks on Australia's policy with respect to administration of territories. He certainly voiced with great confidence the stance that Australia's record in trust territories was beyond the scope of the Commission's power. It is also likely that the delegation was influenced by Fred Whitlam's strong opposition to the self-determination clause. The speeches bear the hallmarks of Whitlam and Spender's legalism noted previously in this thesis.[110] For Whitlam, however, a right of self-determination needed to be resisted for reasons other than protecting the reputation of administering powers.

Internal documents of the Department of External Affairs reveal Whitlam's abiding preoccupation was the implications of a right of self-determination for the stability of existing nation States. His earliest conception of the right of self-determination was that

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107 Cablegram from DEA to Australian Mission to UN, NY, 28/11/52, in NAA 1838/1, Item 856/13/16 Pt 1.

108 In 1951, Casey signalled his consent to Australia opposing self-determination: Memorandum from AH Tange, Assistant Secretary, DEA to Australian representative to the Commission on Human Rights, 13/4/51, in NAA A 1838/1; Item 856/13/10/6 Pt 1.

109 In 1955, Casey rejected the plea of Paul Hasluck, the Minister for Territories, that Australia oppose the discussion of self-determination in the Third Committee. In Casey's view, the Third Committee had clear jurisdiction: Correspondence in NAA A 1838, 856/13/10/10 Pt 2.

110 See Chapter 2.

the right could be equated with a right of minorities to secede from the nation States in which they resided. In the December 1951 meeting of Trevor Pyman and Whitlam (at which the United States proposal was discussed, see above), Pyman and Whitlam agreed that self-determination could be regarded as synonymous with the protection of minorities.[111] In this context, and parallel to the concerns about recognition of a right of minorities outlined in Part A of this Chapter, Whitlam queried the potential embarrassment that a right of self-determination might cause with respect to Australian migration and Aboriginal policy. It was thus concluded that it would be in the best interests of Australia to maintain its opposition to the clause. In the debates in 1952, Whitlam reminded other delegations of the potential application of the clause to minorities in an attempt to lessen enthusiasm for the clause. In the Eighth Session of the Commission on Human Rights, for instance, Whitlam drew attention to the potential application of the right of self determination to existing autonomous states that might be threatened with submergence (for example Yugoslavia), or to separatist movements within existing states, or to the aspirations of minority groups. Spender reinforced this point by suggesting that members of the Commission on Human Rights would hardly countenance the right of German minorities resident in various countries of Europe before World War Two to exercise the right of self-determination and thus to disrupt and dismember the countries in which they lived.[112] Privately, Whitlam expressed some frustration that the debate over self-determination was focusing solely on anti-colonialism and thus failing to appreciate the true breadth of the clause. After the Eighth Session of the Commission on Human Rights, Whitlam reported back to the Department of External Affairs that the majority were 'largely indifferent 'and concerned with 'hammering away at the administrations of trust and non-self governing territories'.[113]

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111 Minute of Meeting between HFE Whitlam and T Pyman , 17/12/51, in NAA A432/20, Item 54/3779 Pt 6.

112 Sir Percy Spender, Australian representative, UN Doc A/C.3/SR 647, 115; 28 October 1955.

113 Report of the Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 2A.

Other internal actors honed in on the international tensions relating to trust and non-self-governing territories. The Department of Territories, for instance, wrote to the Department of External Affairs in May 1955 confirming its opposition to the right of self-determination. In addition to agreeing with comments that the Department of External Affairs had previously made concerning the collective nature of the right, the Department of Territories complained of the difficulties in ascertaining the practical meaning of the clause. Citing the example of Papua and New Guinea, the Department of Territories stated there were people of one race, colour and ethnic qualities who were divided into many smaller communities. The people were unconscious of belonging to any larger group than the local one. In such circumstances, it would be difficult to determine who came within the definition of 'peoples' in the right of self-determination. For the Department of Territories, there needed to be a subjective understanding of a group that they constituted a nation together with sufficient educational and political maturity to support independent political machinery before it was sensible to talk of the application of a right of self-determination. [114] The Department of Territories was also concerned with the way in which any peoples might exercise a right of self-determination, querying if a decision were taken to enter a federation, would the right be exercised for all time?[115]

Regardless of whether Australian actors focused on the implications of the right for trust territories or for all States with minorities, it is apparent that all were basing their appraisals on a limited understanding of the concept of self-determination. Self-determination was understood as 'external self-determination'.[116] The fears expressed were that trust territories would expect independence immediately or that minorities would secede. Self-determination was equated with independence and self-government. There was no conception of a lesser form of self-determination, such as a bundle of participatory rights that would guarantee a group having a voice within a particular

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114 Memorandum from CR Lambert, for the Secretary, Department of Territories to the Secretary, DEA, undated but annotated 'May 1955', in NAA A 518/1, Item 104/5/2 Pt 2.

115 *Ibid.*

116 For an explanation of understandings of 'external' and 'internal' self-determination, see A Cassese, *op cit*, 101

political context. Nor was there agreement that self-determination included full economic autonomy in relation to natural resources. In 1955, for instance, the Australian delegate stated that a right to dispose of natural resources might be interpreted so as to allow a minority within a State to claim the free use of its natural resources, regardless of the economy of the State as a whole or the interests of the group.[117]

It is also apparent that the majority of Australian policy-makers gave no real policy consideration to the implications of the right of self-determination for Aboriginal and Torres Strait Islander peoples. Only one reference to the possibility of Aboriginal self-determination claims embarrassing the government has survived. It is to be found within the minutes of the meeting between Trevor Pyman (of the Department of External Affairs) and Fred Whitlam in 1951.[118] It was given no further consideration. Obviously, the dominant view within Department of External Affairs, that Aboriginal people did not constitute a 'minority', influenced this neglect. If not a minority, then Aboriginal people were less likely to be a distinct 'peoples' entitled to self-determination. Instead, the real threat of the clause remained perceived as its impact upon Australia's external policies with respect to Papua, New Guinea and Nauru.

In contrast to their attitude towards Article 27, Australian policy-makers do not appear to have given any substantial consideration to changing their attitude towards self-determination. Although Clarrie Harders of the Attorney-General's Department suggested in 1966 that, at least in relation to the ICESCR, Australia might consider withdrawing its objection in light of the 'progressive' nature of the ICESCR obligations, the Department of External Affairs was unmoved. No narrow understandings were formulated. Instead Australia maintained its policy of resistance until the General Assembly's adoption of the Covenants. The reason for the contrasting attitudes taken in relation to Article 27 and Article 1 is not clear. Perhaps Australian

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117 Australian representative, HA Mc-Clure Smith, UN Doc A/C.3/SR 669, 227; 23 November 1955

118 Minute of Meeting between HFE Whitlam and T Pyman , 17/12/51, in NAA A432/20, Item 54/3779 Pt 6.

policy-makers considered they were on firmer jurisprudential grounds in resisting a right of self-determination. Alternatively, perhaps Australian policy-makers considered that it would be more difficult to prevent the application of Article 1 to Australian trust territory inhabitants.

Whatever the reason, what emerges most strongly from this Part is the deep-seated nature of Australia's resistance to the right to self-determination of all peoples. As a right equated with a right of political independence, it was viewed as potentially subversive of the interests of any State with minorities and any State with responsibility for administering trust or non-self-governing territories. As with its opposition to a minority rights clause, Australia questioned the appropriateness of recognition of a 'collective right' and indicated a satisfaction that a State's protection of the individual rights of all its citizens would be sufficient to protect their interests.

Conclusion

Australia was consistently opposed to the rights of minorities and the right of peoples to self-determination. Underlying this hostility was a perception that each set of rights threatened vital State interests in Australia and Australia's external territories. In relation to both rights Australia adopted a State-centric approach which gave primacy to the perceived State interest in maintaining cultural homogeneity. While the adoption of a narrow understanding of Article 27 eventually permitted Australia to endorse the right, no such conciliatory approach was attempted with respect to the right to self-determination. In addition, Australia advanced a consistent preference for individual human rights that could be applied to all persons, rather than the recognition of distinct rights for some groups. Collective rights or the recognition of rights which persons possessed by virtue of their membership of a group were viewed as encouraging or creating diversity in circumstances where the desired aim was cultural unity. In resolving the tensions between diversity and unity, Australian decision-makers ultimately accepted only the right of individuals to private exercises of cultural

diversity. So far entrenched was an Anglo-Celtic perspective on culture that Aboriginal people were regarded as possessing neither minority status nor the right of self-determination. Though decision-makers rejected claims that their policies were racist, it is clear that Australian policy-makers in the 1940s through to the 1960s gave meaning to the term 'human rights' through a culturally specific lens: the defence of an Anglo-Celtic homogeneity.

Chapter 4

The Jurisprudence of Human Rights

Introduction

This Chapter considers the jurisprudential assumptions concerning human rights underlying Australia's policies during the negotiations of the International Bill of Rights. Almost twenty years after the finalising of the International Bill of Rights, Jerome Shestack adverted to the lack of a common answer to the question 'what is meant by human rights'.[1] Myres McDougal, Harold Lasswell and Lung-Chu Chen have also pointed to the 'simple intellectual confusion' surrounding the topic of human rights.[2] Australia did not escape this intellectual confusion. In light of the low priority given to jurisprudential debates internationally and domestically, it is not possible to identify any comprehensive Australian jurisprudential approach to human rights in any period of policy development. However, it is possible to extricate a number of divergent jurisprudential assumptions influencing Australian international human rights policy.

Successive Australian policy-makers possessed quite distinct approaches to defining the sources and nature of human rights, and the roles of the individual and the State within an ideal human rights framework. Even where Australian policy-makers tended to agree, as for instance in relation to the adoption of a narrow model of the classic 'rights holder', the area of consensus did not mirror the model of universal, inalienable rights advanced in the preamble of the UDHR.[3] In view of the ongoing debates in academic circles, such diversity is not surprising. Confronting this diversity, however, does dispel any assumption that Australia maintained support for an identified and agreed

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1 J Shestack, 'The Jurisprudence of Human Rights', in T Meron (ed), *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford, 1984, 70.

2 M McDougal, H Lasswell, LC Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity,* quoted by J Shestack, *op cit*, 70.

3 Note in particular paragraphs 1 and 5 of the preamble to the UDHR.

upon set of 'human rights principles' during the negotiations of the International Bill of Rights.

Given the lack of any structured or ongoing international debate on jurisprudential issues during the negotiations, this Chapter moves directly to an examination of Australian policies. It focuses on Australian attitudes towards three issues in particular: (a) the nature and source of human rights, (b) the identity of rights holders and (c) the significance of human rights. Some of the material used has been drawn from discussions in previous Chapters. This material, however, is being used to draw out the theoretical dimensions of Australian policy in a more thematic fashion than has been possible in the subject-specific Chapters.

A. Nature and Source of Human Rights

I. Evatt Period

With the benefit of hindsight, it seems remarkable that the first recorded question of an Australian delegate to the Commission on Human Rights in its deliberations on the International Bill of Rights concerned jurisprudential issues. Colonel Hodgson,[4] as Australian representative, directed a question to John Humphrey, the Director of the Human Rights Division of the United Nations Secretariat and the author of the draft UDHR text then before the Commission.[5] Specifically he queried the underlying philosophy of the draft UDHR.[6] This was to be the only occasion on which an Australian representative initiated a question on the jurisprudential basis of human rights. Whilst the Lebanese representative (Dr Charles Malik) and the Chinese representative (PC Chang) engaged in lengthy debates concerning the meaning and purpose of rights,[7] Australian representatives remained silent. In private

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4 Colonel Hodgson had previously been the Secretary of the Department of External Affairs, a post he held from 1935 until 1945. He was then made Ambassador to France.

5 Col R Hodgson, Australian representative, UN Doc E/CN.4/SR 1, 5; 27 January 1947.

6 *Ibid.*

7 Dr Charles Malik (Lebanon's representative) looked to Christian precepts, especially the teachings of Thomas Aquinas. PC Chang (China's representative), quoted Confucian teachings but

correspondence, Colonel Hodgson was even to describe discussions as to the relationship between rights and the State as 'rambling and, at times, fruitless'.[8] In giving Hodgson his initial instructions, Evatt did not offer any guidance as to the nature of the task confronting the international community other than stressing the importance of ensuring strong methods of international implementation.[9] The overwhelming sense emanating from the instructions to early Australian delegates is that jurisprudential debates were viewed as an unnecessary diversion from the pressing task of drafting internationally binding instruments. As such, Australia sought to short-circuit discussions of the genesis or nature of human rights.

It was with such a reluctant mind-set that the Australian delegation approached the earliest jurisprudential debates in the Commission on Human Rights. The Commission was engaged in a general discussion on the contents of the proposed Bill of Rights 'with a view to ascertaining whether any agreed principles could be ascertained for the guidance of the drafting group'.[10] The Soviet and Yugoslavian delegates placed emphasis on the primacy of the State and the inherently collective nature of society. As a result, the rights of the State and the rights of the community were central. Individuals had only those rights that had been granted by the State. In jurisprudential terms, this outlook was positivist, communitarian and State-centred. Other States, including the United States, took a more natural law, individualist perspective. They saw the rights of the individual as a human person as being paramount over all other considerations. According to this view, human rights were not themselves dependent on the State for their existence. Furthermore, the State lacked the power and moral legitimacy to narrow the boundaries of such pre-existing rights.

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advocated a more universal approach to human rights that recognised the diversity of philosophical approaches: see AJ Hobbins, (ed) *On the Edge of Greatness: The Diaries of John Humphrey*, vol 1, 1948-9, McGill University, Montreal, 1994, entry of 27 September 1948, 58.

8 Cablegram from Col Hodgson to Evatt, 8/2/47, in NAA A 1838/278, Item 856/13 Pt 2.

9 Cablegram from DEA to External Affairs Officer, London, (Hodgson), 23/1/47, in NAA A 1838/278, Item 856/13 Pt 1.

10 Report of First Session of Commission on Human Rights, in NAA A 1838/278, Item 856/13 Pt 1.

The Australian delegation, seemingly without receiving detailed instruction, advanced what it described as a 'middle course'. Without explicitly addressing the source of human rights, the Australian delegation argued that human rights were not absolute in the sense suggested by the United States. In addition to possessing rights, each individual had a duty to respect the rights of others and the law of the land in the interests of the State.[11] Despite self-consciously putting forward this proposal as a compromise rather than a considered declaration of philosophy, there were a number of jurisprudential assumptions underpinning the compromise proposal that were mirrored in Australia's stance on 'substantive clauses'.

First, in the Australian 'middle course' proposal, human rights were not envisaged as enjoying priority over all other considerations. To use Ronald Dworkin's terminology, rights were not seen as operating as automatic 'trumps' in a given situation.[12] Limitations on human rights were foreshadowed as being acceptable in two situations: (a) where limitations were necessary so as to protect the rights of others, and (b) where the exercise of human rights was regarded as incompatible with ' law of the land in the interests of the State'. The first limitation echoed that commonly found in liberal discourse about the limits of personal freedoms.[13] The second limitation, that relating to the 'laws of the land', was *prima facie* much broader. The Australian delegation did not qualify it by reference to the laws needing to have legitimate ends or needing to be consistent with recognition of human rights. It might have been read as permitting any limitation on rights, provided the limitation was expressed in law. However, the reference was to respecting 'laws of the land *in the interests of the State'* (emphasis added). When taken against the background of Australia's proposal that human rights be included in the fundamental law of the State parties (a subject discussed in Chapter 6) and so serve to limit the State's law making powers, it is at least arguable that the

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11 Report of First Session of Commission on Human Rights, in NAA A 1838/278, Item 856/13 Pt 1.

12 R Dworkin, *Taking Rights Seriously*, Duckworth, London, 1977, 269 ; R Dworkin, 'Rights as Trumps', in J Waldron (ed), *Theories of Rights*, Oxford University Press, Oxford, 1984

13 As noted in Chapter 2, liberal theorists such as John Stuart Mill permitted interference with an individual's freedoms only in the limited circumstances where exercise of one individual's rights infringed another's rights: see for instance, JS Mill, *On Liberty*, ed by S Collini, Cambridge University Press, Cambridge, 1989, 13-15.

Australian delegation meant that only general laws, that themselves were not repugnant with the very basis of human rights, would serve to limit the operation of human rights. Australia's support at the time for a limitations clause that referred to 'laws which were designed either to secure respect for others' rights or meeting the requirements of morality, public order, and the general welfare'[14] would confirm this narrow understanding of permissible limitations.

Secondly, the Australian proposal accepted the coexistence of rights and duties. The individual was said to be under a 'duty' to respect the rights of others and the laws of the land. However, these duties were conceived of as separate or additional to the possession of human rights. The duties did not form part of the definition of the rights. The individual's possession of rights was not dependent upon performance of the duties. Instead, the exercise of rights or the extent to which rights might be enjoyed was legitimately qualified by the individual's duties to respect the rights of others and respect the law of the land. A similar point of view was evidenced by the Australian delegate, Ralph Harry, during the drafting negotiations. As discussed in Chapter 2, Harry suggested a composite text to sum up a State's responsibilities with respect to non-discrimination. It read:

> All men (without distinction as to race, sex, language or religion) are born free and equal and have certain inalienable rights fundamental to their life as reasonable beings, brothers within the family of mankind. These rights are limited only by the equal rights of others as individuals, and by the duties man owes to society through which he is enabled to develop his spirit, mind and body in wider freedom.[15]

It is noticeable that the only reference made to duties was the duties 'man owes to society'. The omission of a reference to duties to uphold the law does not appear to have been of major significance however. At the same time as proposing the composite non-discrimination text, Australia was supporting the adoption of a general limitations clause that would make all rights subject to restrictions embodied in State laws.[16] In

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14 Report of Representative to Third Committee concerning the UDHR, in NAA A 518/1, Item 104/5/2 Pt 1. This clause became Article 29, UDHR.

15 RL Harry, Australian representative, UN Doc E/CN.4/AC.1/SR 13, 4; 9 June 1947.

16 Report of Representative to Third Committee concerning the UDHR, in NAA A 518/1, Item 104/5/2 Pt 1.

referring to an individual's duty to society, Harry seems to have been endorsing a 'social contract' theory of social organisation: in exchange for the protection and benefits offered by membership of the community, individuals agreed to abide by certain rules for the benefit of the collective.[17] The Australian delegation was similarly supportive of Article 29 of the UDHR's reference to duties of the individual. In reporting on the final debates in the Third Committee, Alan Watt, the Australian representative, described the inclusion of Article 29 as 'particularly important'.[18] In contrast to Australia's later public attitude, rights and duties existed independently – the non-performance of duties did not negate an individual's entitlement to his/her rights.

Thirdly, the Australian compromise 'middle course' proposal reflected a belief that in the field of human rights, the only rights holders were individuals. There was a clear dichotomy utilised in the proposal. Individuals had rights whereas the State had 'interests'. No reference was made to 'rights' of the collective group, only to the 'rights of others'. 'Rights of others' seems to have been equated with the rights of other individual persons. The emphasis on rights of individual persons had expansive and restrictive implications. In theory, it committed the Australian government to recognising the human rights of all individuals. Yet, the emphasis on individuals' rights also bolstered Australian claims that rights which could not be, at least potentially, enjoyed by all, were illegitimate. As the discussion in Chapter 3 has shown, for instance, the preference for individual human rights was to be used as ammunition against recognition of minority rights.

Fourthly, though the delegation made no mention of the source of human rights in advancing the 'middle course' proposal, there was an implicit acceptance that human rights existed independently of State action. By mentioning that rights might be limited

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17 This is similar to the notion of a social contract or compact in which an individual agrees to surrender part of his/her natural liberties in return for the safety provided for in the collective: see for instance, T Paine, *Rights of Man*, ed by G Claeys, Hackett Publishing Company, Indianapolis, 1992, 39.

18 Report of Representative to Third Committee concerning the UDHR, in NAA A 518/1, Item 104/5/2 Pt 1.

by the law of the land, the implication was that rights existed *a priori* and were subsequently limited by State action. State action did not have the effect of shaping them or preventing their creation. It was a conception equally evident in the language chosen in the composite non-discrimination text put forward by Ralph Harry.[19] This text stated that men were 'born with inalienable rights that were fundamental to their life as reasonable beings' (full text quoted above). A similar stress on human rights existing independently of State recognition was apparent in the support given by the then Crown Solicitor, Fred Whitlam, for an additional paragraph in Article 3 of the UDHR stating 'Everyone is entitled to these rights and freedoms as attributes of his personality'.[20] The value of such an addition was seen as making clear that the rights and freedoms belonged to an individual by virtue of 'his existence as a person and not by the grace and favour of the State.'[21]

Fifthly, by talking in general terms about human rights, the sense created by the Australian 'middle course' proposal was that human rights were eternal. Rather than being limited to one epoch or arising out of specific historical events, human rights were envisaged as having a timeless operation. A similar concept was evident in Australia's drafting contributions. Australia, for instance, sought to have the reference to World War Two deleted from the preamble to the UDHR, arguing that it unduly limited the understanding of human rights.[22] The lack of attention given to such matters and the surprise and frustration evinced by Australian delegates at the lengthy theoretical debates also demonstrate a belief that the existence and legitimacy of human rights were beyond question. On this view, human rights existed and continued to exist. The task of delegates was merely to find the agreed language to express such rights. Having reduced the significance of the drafting task to a technical, rather than

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19 RL Harry, Australian representative, UN Doc E/CN.4/AC.1/SR 13, 4; 20 June 1947

20 Memorandum of HFE Whitlam, Crown Solicitor, to the Secretary, Attorney-Generals Department, 18/3/48, in NAA A 1838/1, Item 856/13/7 Pt 1.

21 *Ibid.*

22 A Watt, Australian representative, UN Doc A/C.3/SR 164,752; 29 November 1948.

substantive, matter, the delegates saw the important task to be developing norms of international enforcement.[23]

Yet the idea of eternal pre-existing rights was not universally applied by Australian delegates. In particular, a more cautious jurisprudential approach was used with respect to the recognition of economic and social rights. In the debates on the one or two Covenant issue (discussed in Chapter 1), there is a sense in which States were seen as not simply defining rights but as being intimately involved in an evolutionary process of creating human rights. KCO (Mick) Shann as the Australian representative in 1949, for instance, argued that the relevant question was whether the world had attained a level of evolution where it was possible to declare that the individual had true rights and the State formal responsibilities in that field.[24] It is possible to view Shann's statement in one of two ways. The first is that human rights themselves evolved as States accepted their role in protecting individual rights in novel areas (an 'evolving human rights' approach). The second interpretation is that States developed a greater understanding of pre-existing human rights over time (an 'evolving understanding' approach). Although it would be more consistent with the 'eternal human rights' approach discussed above if Shann were intending the 'evolving understanding' approach, the stronger implication is that he was expressing an 'evolving human rights' approach. Shann framed his question in terms of whether it was possible to declare that the individual *had* 'true rights' in the field of economic and social rights.

If this 'evolving human rights' approach is a correct interpretation of Shann's statement, it serves as evidence for a certain ambivalence in the Australian approach. It arose only in relation to economic and social rights – a field in which the Australian delegation seem to have felt the need to justify the recognition of what might be regarded as 'novel' rights. The 'evolving human rights' approach allowed the delegation to

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23 Evatt's initial cablegram directing Colonel Hodgson to attend the First Session of the Commission on the Human Rights stressed the importance of devising a scheme for the international implementation of rights: Cablegram of DEA to External Affairs Officer, London, (Hodgson), 23/1/47, in NAA A 1838/278, Item 856/13 Pt 1.

24 KCO Shann, Australian representative, UN Doc E/CN.4/SR 131, 3ff; 16 June 1949.

reconcile their tasks of protecting well-established human rights and encouraging States to expand their activities into new fields. There was little concern that differing philosophical assumptions were being used in the economic and social field as with 'human rights' generally. Perhaps the reason for this complacency was that Shann and other members of the Australian delegation assumed that if States took their responsibilities to their people seriously, they would see that their only option was to recognise the pre-existing needs of individuals which would lead to the recognition of social and economic rights. The approach did not condone States choosing to withhold recognition of such rights. Instead, it mandated the adoption of rights that would continue to be given recognition and protection for further generations.

Outside the context of the 'middle-course' proposal, a number of other distinct jurisprudential assumptions can be identified. Breach of human rights was not regarded as a sufficient justification for armed insurrection or revolution. Thus, the one aspect of the preamble of the UDHR that the Australian delegation resisted was that of the right of oppressed persons to rebel. The third paragraph of the UDHR preamble states 'it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression that human rights should be protected by the rule of law'. Australian delegates presented Australian law as being designed to prevent persons taking justice into their own hands. Any international instrument on human rights should encourage individuals to obey the law and not to resort to unconstitutional means of changing the law.[25] The ideal presented was that people should use their political structures to ensure respect for human rights. Respect for human rights was regarded as a feature of mature political systems and individuals were viewed as capable of developing their political structures into mature ones without the use of violence.

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[25] A Watt, Australian representative, UN Doc A/C.3/SR 164, 752; 29 November 1948; See too Report of Representative to Third Committee concerning the UDHR, in NAA A 518/1; Item 104/5/2 Pt 1.

Human rights were regarded as being endowed with moral, political and legal significance. As an indication of the belief in human rights' moral significance, religious leaders were appointed to act as advisers to Australian delegations.[26] Although they were not particularly influential in contributing to particular policy, the fact that religious leaders were asked to participate is evidence of the view that human rights touched upon issues relating to ethics and morality. For Evatt, it was self-evident that human rights' operation went beyond the moral sphere. Human rights were an important element in defining the appropriate relationship between the State and the community. Thus in 1949 in sending a message to the President of the French Republic for the opening of UNESCO, Evatt described the UDHR in the following terms:

> The Declaration was a solemn pronouncement by governments that the power exercised by governments is to be used by them in trust for the benefit of those they govern.[27]

Respect for the rights contained in the UDHR was seen as a means by which the State remained faithful to its grant of power. A State that did not accept and respect such rights was not legitimately exercising power from the people. Human rights thus formed part of the definition of the political contract between individuals and their government.

There is no doubt that Australian delegations during the Evatt period were committed to human rights having a further significance. Human rights were to become legally enforceable rights. By virtue of this conviction, Australian delegations favoured strong implementation methods of human rights both internationally and domestically (a subject taken up in Chapters 5 and 6). The Australian delegate in 1947 was to declare in the Commission on Human Rights:

> In English law the remedy is to us as important as the right, for without the remedy there is no right.[28]

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26 Bishop O'Brien and the Reverend Alan Walker attended sessions of the Commission on Human Rights: see Reverend Alan Walker's Report, April 1949, in NAA A 1838/283; Item 852/10/18 Pt 3; Bishop O'Brien, Impressions of Commission, December 1948, 'Overseas Trip' Folder, Evatt Collection, Flinders University.

27 Cablegram from DEA to Australian Embassy, 28/9/49, 'Cables-Paris-1946-49' Folder, Evatt Collection, Flinders University.

28 Statement by Australian Representative on International Court of Human Rights, undated, circa 1947, in NAA A 432/82, Item 1947/725 Pt 3.

Whilst not necessarily convinced that the same method of implementation was appropriate for all categories of rights, no right was regarded as outside the scope of domestic and international implementation and enforcement. Not all to whom Evatt turned for advice shared this vision. Sir Frederick Eggleston, an academic and occasional diplomat, considered that some of the rights being considered were meaningless. In responding to the draft of Article 28 of the UDHR, for instance, Eggleston stated:

> This seems to me to be a good illustration of the intellectual attitude in which these rights are expressed. A right of this kind, if it be called a right, cannot be given legal expression; and pious aspirations of this nature seem to me to be absurd and to discredit the whole attempt. The only way to get a good social and international order is by the disinterested effort of millions of human beings willing to make sacrifices for their objectives.[29]

Eggleston did not reject the existence of human rights. He simply doubted whether human rights could be made the subject of legal protection. Notwithstanding his doubts, Australian delegations during the Evatt period consistently supported the international and domestic legal enforcement of human rights. As seen in Chapter 1, it seems likely that Evatt's vision of an international order of human rights was most responsible for this commitment and conceptualisation. There was little in the Labor Party platform that made adoption of these stances inevitable. Instead, the key factor seems to have been the personal political philosophy held by Evatt and his supporters. Once Evatt departed and new personalities took control of Australia's policy, Australia's jurisprudential stance altered significantly.

II. Spender Period

With the appointment of Percy Spender as Minister for External Affairs in 1949 and the rise of Fred Whitlam as the major bureaucratic player in developing Australian policy, came a slow erosion of the jurisprudential outlook of the Evatt period. Although 'human rights' continued to be used as a category of pre-existing moral rights, the task of drafting internationally enforceable human rights was viewed as a distinct process in

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[29] Comments of Sir Frederick Eggleston on the Report of the Australian Representative on the Commission on Human Rights, Third Session, in NAA A 1838/1, Item 856/13 Pt 5.

which States played the major constitutive and definitional roles. In the absence of State action to adopt human rights standards and transform them into legal rights or limitations, human rights had no inherent force. States were thus viewed as the authorities which were at liberty to decide whether or not to cede their power in certain areas. Positivism thus came to dominate the conceptualisation of human rights. The relationship between rights and duties was also reconceived. Duties were transformed from the independent corollary of rights to necessary pre-conditions for the enjoyment and exercise of rights.

In the general statements made by Australian delegates during the Spender period, there was a continuation of the inalienable, inherent, eternal view of human rights espoused during the Evatt period. Whitlam, as Australian representative at the 138th meeting of the Commission on Human Rights, for example, argued that it was inappropriate to have rights 'defined' in the Covenant. They could only be 'recognised' in the Covenant.[30] In expressing his rationale, Whitlam stated that rights were not granted from above 'as from some sovereign overlord' or 'in a bargaining instrument', but were inherent in mankind and were the attributes of mankind.[31] This lead inexorably to the conclusion, he argued, that rights must be recognised rather than defined in the Covenant:

> The peoples of the world would be asserting for themselves the rights that belonged to them; such rights could not be defined, they could only be recognised.[32]

At the same time, however, a distinction began to be drawn between human rights in general and human rights as they were encapsulated in legally binding instruments. Human rights were seen as having a raw, moral existence that was not identical to their refined, legally enforceable existence. The UDHR, for instance, was characterised as a 'statement of the noble strivings of humanity which had seen the light of day after years of struggle'.[33] By describing the contents of the UDHR as 'strivings', the status of the

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30 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 138, 7; 29 March 1950.
31 *Ibid.*
32 *Ibid.*
33 *Ibid*, 6.

substantive human rights contained therein was implicitly diminished. In other statements, the contents of the UDHR were described as 'ideas' that were not translatable to legal formulae.[34] Thus Whitlam at the Commission on Human Rights stated that:

> Attempts to change the ideas set forth in the Declaration into legal formulae would inevitably diminish both the value of the ideas and the efficacy of the Covenant.[35]

Australia rejected the idea that the role of the Commission was to re-formulate generally agreed upon human rights for inclusion in legally binding instruments. Instead, it argued that a further selection process had to take place to choose which of the UDHR standards were appropriate for inclusion in a legally binding instrument. A division was thus drawn between legally justiciable human rights and non-justiciable human rights. In his report back to the Department of External Affairs on the lessons to be learnt from the Fifth Session of the Commission on Human Rights, Whitlam emphasised the importance of this dichotomy:

> In terms of Anglo-Saxon jurisprudence, the draft covenant has some unusual features. Apart from the difficulty which attends on all large assemblages of obtaining ready agreement about phrases, there has had to be recognized the differences that exist in institutional patterns and in the states of public order of the various societies represented on the Commission. These differences manifested themselves in a certain hesitancy in distinguishing between the moral and imaginative character of the Universal Declaration and the juridical and precise demands of the covenant, in a tendency to turn to rather vague and impressive language for introductory expressions in articles, and a desire to utilize institutions of law beyond the limits normally set to them in Anglo-Saxon jurisprudence.[36]

In Whitlam's world view, elaborate provisions that mentioned the genesis of rights equated with 'moral and imaginative' statements. The task of the Commission was to identify and discard any excess packaging around statements of human rights, to leave brief, precise statements of obligations. Whitlam thus decried the French proposal to insert a clause stating 'human life is sacred'. In Whitlam's view, the clause was unsatisfactory because it failed to define for what purposes human life was sacred.[37] A preferable form according to Whitlam was the Lebanese suggestion that '[e]veryone's

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34 *Ibid.*

35 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 139, 11; 30 March 1950.

36 Memorandum from HFE Whitlam, Australian Mission to the UN, NY to the Secretary, DEA, 29/7/50, in NAA A1838/1, Item 856/13 Pt 7.

37 *Ibid.*

right to life shall be protected by law'. He commended its simplicity in the following terms:

> while avoiding a rather mystic intrusion into a juridical instrument and at the same time satisfying an urge for a 'flag', it stated no more than a legal platitude and was not likely to be treated by a Court as other than that.[38]

Underlying Whitlam's emphasis on legal formalism was a subtle reconceptualisation of the task of representatives in drafting human rights protections. The rigours of Anglo-Saxon drafting style were to operate in order to contain the scope of rights so that their force was confined within narrowly defined boundaries. Those boundaries were to be determined by what was acceptable to States.

The State was seen as enjoying a wide discretion in accepting or rejecting human rights and determining the applicability of rights within a particular context. Spender gave the Department of External Affairs strict instructions that delegations were not to approve any contentious clause unless he was made aware of its full implications and signalled approval.[39] Yet in addition to political deference in decision making about contentious clauses, Australian policy-makers promoted a view of the State having full moral authority to delineate the scope of internationally recognised human rights. Rather than seeing their role as being the agents of individuals in providing mechanisms for enforcement of human rights against States, stress was laid upon the role of delegations to represent the State in assenting or objecting to statements regarding human rights. Thus Whitlam invoked the United Nations Charter as not merely proclaiming principles, but setting out in clear-cut terms certain obligations to which the signatory States had voluntarily subscribed.[40] State assent had thus become the source of legitimacy for human rights. The task of delegates was to draft an 'effective instrument' that governments would be able to accept. Delegates, he said, should not feel pressured or unduly concerned by non-government opinion that sought broader guarantees of rights since governments 'must recognise that in the democratic system they could not move ahead of public opinion'.[41] It appears to have been assumed that

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38 *Ibid.*

39 Annotated Submission to Minister for External Affairs, 4/5/50, in NAA A 1838/1, Item 856/13 Pt 8.

40 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR.137, 9; 29 March 1950.

41 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 211, 14; 23 April 1951.

governmental interest in human rights equated with public opinion. Such statements might be regarded as simply a reflection of political realism. Yet, the underlying premise was that States had the power to determine what rights should be recognised and that it was a power untrammelled by exterior notions of the 'inherent rights of man'.

Accompanying this emphasis on State power was a particularly wide reading of the State's power to impose limitations on human rights. This was evident, for instance, in the interpretation Whitlam gave to what was to become Article 4 of the ICCPR, the clause permitting a State to derogate from certain human rights in times of emergency. Whitlam suggested that the term 'emergency' should be regarded as covering general strikes on the basis that general strikes often led to economic and social disorder, and the disruption of the means of transport and food supplies.[42] Police action to combat the difficulties of such a strike, he argued, should be permissible under the Covenant.[43] When challenged by the Yugoslavian representative that the right to strike was itself a human right and as such could not be considered as giving rise to a public emergency, Whitlam remained resolute. Strikes causing nationwide disturbances might be engendered by subversive elements seeking to disrupt the economic and social system and to endanger public order and national security and as such constituted a public emergency.[44] In light of Menzies' ongoing concern that industrial action was a tool wielded by communist sympathisers,[45] Whitlam's resolve is not surprising. However, its importance in the current context is to demonstrate Whitlam's broad view of the situations in which derogation of human rights was legitimate. Where exercise of a right threatened the national interest, Whitlam's response was to permit a State not only to restrict the exercise of that right, but to restrict all human rights until the situation was remedied.

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42 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 195, 15; 16 May 1950.

43 *Ibid.*

44 *Ibid.*

45 Menzies, for instance, depicted the 1949 coal strike as engineered by communist sympathisers. It was a view also proclaimed by some Labor Ministers such as Arthur Calwell: see D Lowe, *Menzies and the Great World Struggle: Australia's Cold War: 1948-1954*, University of New South Wales Press, Sydney, 1999, 23.

It is possible to cite other examples of Australia's State-centred approach to defining human rights. In relation to the ability of States to limit rights on the basis of 'national security', for instance, the Department of External Affairs argued that the concept of 'national security' was to be left to individual States for application and was not to be subject to international scrutiny.[46] As seen in Chapter 2, the desire of the Department of External Affairs was to legitimate the restriction of rights where necessary to combat the spread of communism. Australian policy-makers did not want to open up the sufficiency of this justification to international scrutiny. Similarly, Whitlam, as Australian representative, did not feel abashed in justifying particular stances on the basis of a wish to preserve the status quo in Australia. In the context of discussing an individual's right to compensation in circumstances where he/she had suffered an arbitrary deprivation of property, Whitlam stated explicitly that he did not consider himself bound by a text which would necessitate changes in Australian legislation.[47] No limits to the legitimacy of State shaping of norms in such a fashion were acknowledged.

Besides this State-centrism, the Spender period is remarkable for its re-conceptualising of the relationship between rights and duties. Whilst representatives during the Evatt period embraced the co-existence of rights and duties, Spender shifted the emphasis towards interdependence of rights and duties, at least in relation to economic and social rights. In April 1951, for instance, Arthur Tange, then Assistant Secretary of the Department of External Affairs, reminded Whitlam of Spender's view that:

> any right accorded by a State may be absolute or qualified. In my view it ought to be qualified by some duty whether in form above or another. I think we always tend these days to place emphasis on rights of individuals without any consideration of duties. To every right or for nearly every one there should be some correlative duty.[48]

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46 Cablegram from DEA to Australian Mission to the UN, 12/5/50, in NAA A 1838, Item 856/13 Pt 8.

47 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 159, 8; 18 April 1950.

48 Memorandum from AH Tange, Assistant Secretary, DEA to Australian Representative to the Commission on Human Rights, 13/4/51, in NAA A 1838/1, Item 856/13/10/6 Pt 1.

The key point in this statement is that duties were not only correlative to rights, but *qualified* the rights. Duties were to be inserted into the very definition of rights, at least in relation to economic and social rights.

The way in which this philosophy manifested itself in the draft rights advanced by Australian delegations during 1950-1 has been dealt with in Chapter 1. For present purposes one example suffices. Spender proposed the insertion of a reference to a contributory system into the guarantee of social security:

> Everyone shall have the right to social security which shall be guaranteed by the provision of social benefits, either in cash or in kind, assuring to every person at least the means of subsistence and, when necessary, adequate treatment in any common contingency occasioning the involuntary loss of income or its insufficiency to meet family necessities. The State may prescribe that all or any of such benefits may be provided under a general contributory system.[49]

The draft clause retained the basic statement of right. Insertion of the contributory system qualification was designed to illustrate that individuals bore the primary responsibility for fulfilling their rights. Their duty was thus not simply to obey laws or respect the rights of others (as it had been regarded in the Evatt period), but to expend energy so as to ensure enjoyment of rights. Under this model, failure to fulfil one's duty could result in failure to enjoy rights. The State was not even conceived of as underwriting individual failure to perform one's duty. As such, rights became partially, if not wholly, dependent on individual action. Rights became opportunities that required the exercise of individual initiative to be realised. The State was not responsible for seeing that individuals enjoyed the right such as employment (an 'outcome' view of rights), but responsible merely for providing the environment conducive to the exercise of individual initiative.

As a philosophy, this conceptualisation was not universally applied. There was no attempt in the field of civil and political rights to condition an individual's right to enjoy rights upon fulfilment of duties of individual initiative. In part the selectiveness of approach may have reflected the distinct conceptualisation of civil and political rights.

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[49] Quoted in Cablegram from APR Renouf, DEA to IG Sharp of Department of Labour and National Service, in NAA A 1838/1, Item 929/4/4 Pt 1.

As Chapter 2 has revealed, during the Spender period civil and political rights came to be envisaged as 'civil liberties', protections of areas of individual freedom against State interference. Given this image of States desisting from conduct, it would have been difficult to place the burden for fulfilment of the right on the individual. Another factor contributing to the selectiveness of statements about duties may have been the dominance of international discussions as to the formulation of economic and social rights during the Spender period. However, at least in part, the selective use of the duties philosophy seems referable to a belief that civil and political rights were non-negotiable rights whereas economic and social rights had not reached this status. The jurisprudential divide between civil and political rights and economic and social rights thus widened from a debate about the genesis of the rights (in the Evatt period) to the appropriate protection to be afforded to such rights (in the Spender period).

To the extent that particular causal factors can be identified for these shifts in Australia's jurisprudential stance, party political divisions appeared to play a lesser role than the personal political philosophies of Australian policy-makers, in particular Spender and Whitlam. A Liberal emphasis on individual initiative (discussed in Chapter 1) can be detected in the emphasis on individuals being empowered to seek the realisation of economic and social goals. However, nothing in the Liberal philosophy (as opposed to the Labor philosophy) would pre-determine a stance of State-centrism. Indeed internationally, an approach of favouring a positivist, State-defined set of human rights was associated with States adopting a socialist perspective.[50] Instead, the development of the division between moral rights and legal rights and the central role given to the State in defining the latter category of rights seems to owe its creation to the State-centric perspective of Spender and Whitlam. For them, States were entitled in international negotiations to restrict their consent to those rights which they could accommodate in their national spheres. It was a view that accorded with the traditional international law doctrine of State sovereignty.[51] Australia was viewed as a

50 See earlier discussion of the First Session of the Commission on Human Rights, 149.

51 State sovereignty has been a dominant concept in international law from the seventeenth century. Indeed Cassese has highlighted the extent to which State sovereignty and the unfettered freedom of

comparatively enlightened State in terms of recognising the interests of Australian individuals in enjoying certain rights. Individuals' interests would be best served through permitting the continuation of orderly government and the promotion of democracy. After the departure of Spender from the domestic sphere, Whitlam continued carrying the torch of State-centrism into the Casey and Bureaucratic period.

III. Casey and Bureaucratic Period

During the early Casey Ministry and throughout the period described as the Bureaucratic period in policy development, one sees the continued development of several of the trends noted in the Spender period. A separation of juridical and non-juridical human rights was maintained. Other dichotomies such as 'political principles' (supported by emotion) versus 'rights' (supported by rationality), and 'aspirations' versus 'rights' were employed to narrow the field of legitimate, internationally enforceable rights. UDHR rights continued to be seen as non-legal prescriptives to be achieved only progressively whilst the gap between economic and social rights and civil and political rights widened. Explicit reliance on the inter-dependence of rights and duties subsided only to be replaced by a hostility to having the State provide material benefits to individuals in any of the civil, political, economic, social or cultural fields. Furthermore, a State's recognition of rights remained a discretionary matter, secondary to a State's institutional interests.

As in early periods, Australian delegations neither sought to proffer a definition of human rights, nor to dispute the existence of 'inalienable' human rights.[52] Instead, delegations preferred to draw a distinction between those rights that were appropriate for inclusion in the Covenant and those that were not. The UDHR came to occupy an ambiguous position. It was championed as the embodiment of human rights standards

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States has survived notwithstanding the reconceptualisations urged by modern theorists and newer States: see A Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1986, 4, 31-32.

52 See for example, HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 333, 5, 7; 12 June 1952.

on occasions when Australia was seeking to dispute the existence of a right that had not been articulated in the UDHR. The debates over the right of self-determination were one instance in which recourse to the UDHR was undertaken in order to challenge the legitimacy of a right.[53] At the same time, Australian delegations were not prepared to accept the potential of all rights articulated in the UDHR to be recognised in the Covenants. Thus in a submission to Casey in November 1951, the Department of External Affairs suggested that the Australian delegation 'emphasise that the draft Covenant on human rights should not be a mere echo of the Universal Declaration of Human Rights but should be in the form of a binding international treaty'.[54] Similarly, Kenneth Bailey, as Solicitor-General in proposing a response that Prime Minister Menzies might use in replying to letter from a constituent, described the UDHR as aspirational in form. Bailey stated:

> nor was it intended by the General Assembly that the Declaration should be regarded as legal prescriptions. Indeed its purpose is quite otherwise, for as the Declaration itself shows, its purpose is to serve as a 'common standard of achievement for all peoples and all nations...'. In other words, the Declaration is a summary statement of those human rights and freedoms which the General Assembly affirms are entitled to universal recognition but which can only be achieved progressively. [55]

The task of the Commission on Human Rights continued to be seen in terms of sifting through the UDHR, selecting justiciable rights and refining those rights into a form appropriate for legally binding obligations. In December 1951, Ralph Harry, as Australian delegate, described the task of States to the Third Committee of the General Assembly in the following terms:

> we have undertaken to translate the imaginative inspiration of the Declaration into such legal obligations as may appropriately be undertaken by States and which a substantial number of them are prepared to accept.[56]

Whitlam continued to criticise other delegations' failure to 'distinguish between the moral and imaginative character of the Universal Declaration and the juridical and precise demands of the Covenants.' [57]

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53 This point is discussed at greater length in Chapter 3.

54 Submission to the Minister for External Affairs, 14/11/51, in NAA A 432/20, Item 54/3779 Pt 7.

55 Memorandum from KH Bailey, Secretary, Attorney-General's Department to the Secretary, Prime Minister's Department, 26/2/52, in NAA A 462/21, Item 575/1.

56 RL Harry, Australian representative, UN Doc A/C.3/SR 363, 100; 10 December 1951. A copy of the full text of this speech is in NAA A 1838/1, 856/13/22.

57 Report of the Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 2A.

The language used to distinguish between provisions of the UDHR and the draft Covenants is revealing. In the comment of Whitlam quoted above, 'moral and imaginative' clauses were distinguished from 'juridical and precise' ones. In linguistic terms, the categories are not exact opposites. One would expect the opposite of moral and imaginative clauses to be immoral and dull clauses rather than juridical and precise ones. However, the use of this dichotomy suggests that juridical and precise rights were equated with rights that conformed to existing legal norms. They did not involve transformation of existing legal structures – and thus did not have an 'imaginative' or a 'moral' character. Instead, human rights suitable for inclusion in a draft Covenant were to fit within existing structures, in particular, within the legal framework defining powers of the State.

The application of the sifting process to select those rights appropriate for inclusion in a legally binding instrument led the Australian delegation to reject rights that included too extensive or too imprecise State obligations. Rights involving detailed State action were described as 'derivative' rights. The comments of the Australian government to the United Nations Secretary-General in 1951, for instance, noted with concern the tendency to include such derivative rights as an obligation on States to devise a two year plan on realising the right to education.[58] At the same time, the Australian delegation ruled out of contention for inclusion in the Covenants clauses that did not give rise to a precisely defined State obligation. Ralph Harry, for instance, when before the Third Committee in December 1951, gave the example of Article 28 of the UDHR as a right that should not find a home within the Covenant:

> In a Covenant or Treaty as distinct from a Declaration it is not sufficient to be able to define a Human Right. The question is what action is required from States or from what action States should be bound to refrain. It is for this reason that the rights to be dealt with by covenant may not be so extensive as the rights included in the Declaration. It was possible, for example, for States to agree in the Declaration that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised'. It is obvious, however, that it would be

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58 Cablegram from DEA to Australian Consulate General, Geneva, 3/8/51, in NAA A 1838/1, Item 856/13/7 Pt 2.

> impossible to define in a treaty what action States should take to give effect to this right.[59]

In the same speech Harry rejected inclusion of a right of self-determination on similar grounds.[60]

On the surface the application of these drafting standards to object to certain clauses could be interpreted as representing nothing more than a rigorous 'quality control process' that sought to maintain a high level of precision in legal drafting. Certainly contemporary commentators such as Geoffrey Sawer noted that Australia was gaining a reputation for being a pedant on matters of drafting.[61] However, had a pure concern with drafting been the case, the Australian delegation could have chosen to re-draft clauses in such a way as to provide consistency and clarity. The Australian delegation, for example, could have cooperated in the task of elucidating the State obligations that arose from the obligation to respect the right of self-determination or elaborated upon the nature of the desired 'social and international order' required to realise the Declaration. Instead, the Australian delegation used the existence of such drafting flaws to object to the very basis of the rights.[62] This reveals the extent to which Australia's perceptions of drafting flaws disguised a fundamental unease with the human rights in question.

It is interesting to note that besides the separation of human rights into the categories of juridical and non-juridical, the Australian delegation attributed other delegations' support for opposed clauses, such as the right of self-determination and the application of human rights to all dependent territories, to 'emotion'. Thus, in explaining the nature of Australia's objections to various draft clauses of the ICCPR in the Brief for the 10th Session of the Commission on Human Rights (1954), the root problem was identified as

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59 RL Harry, Australian representative, UN Doc A/C.3/SR 363, 100-101; 10 December 1951. Note that this is the same clause whose inclusion in the UDHR was questioned by Sir Frederick Eggleston during the Evatt period.

60 *Ibid.*

61 G Sawer, 'Problems of Australian Foreign Policy: June 1956 – June 1957', (1957) 3 *Australian Journal of Politics and History* 1, 9.

62 Australia's objections to the right to self-determination were multi-faceted and relied on more than the drafting flaws of the bland statement. It is discussed further in Chapter 3.

arising from provisions written 'as a result of the emotional attitudes of many governments towards the handling of problems in the colonial and related fields'.[63] Attachment to the right of self-determination, in particular, was seen as associated with this 'emotional' way of thinking. The Australian policy was, by implication, presented as the product of rational consideration of the utility of human rights.

Not all juridical rights recognised by the Australian delegation were to be legally enforceable or justiciable. Economic and social rights in particular were regarded as aspirational. They were to be placed into a separate Covenant and have separate, generalised implementation relying on reporting by States rather than the imposition of legal remedies.[64] Thus within the field of juridical human rights, a further distinction was developed between aspirational and enforceable human rights. Economic and social rights had thus become two steps removed from Evatt's policy of enforceable human rights: they were not universally suitable for inclusion in Covenants binding as a matter of international law and their designation as 'rights' did not entail their entitlement to be incorporated within the domestic legal setting.

In the early period of the Casey Ministry, the Australian delegation persisted with its emphasis on the interdependence of rights and duties. Whilst not pushing for the integration of rights and duties in the definition of rights, Australian delegations supported the use of general references to parallel duties for all forms of rights. In May 1952, for instance, it proposed with Sweden an amendment to the United States draft preamble to the ICCPR inserting a paragraph dealing with duties:

> Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in this Covenant. [65]

Though not as explicit as statements during the Spender period, the clause was broad enough to encompass both an individual's duty to respect the rights of others, but also

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63 Brief for the Australian Delegation to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/9 Pt 3.

64 The issue of the implementation of rights is considered further in Chapters 5 and 6.

65 UN Doc E/CN.4/L 171. This proposal was adopted unanimously: E/CN.4/SR 333,9: quoted in MJ Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, 12.

to be responsible for his/her own enjoyment of rights. The Australian delegation was ultimately successful in having this clause incorporated in the preambles of both the ICCPR and ICESCR. Later Briefs did not devote particular attention to the clause. However, by remaining supportive of this clause in each Covenant, the Australian delegation retained a commitment to envisaging the individual as the primary agent for the realization of human rights.

Alongside this reliance on individual initiative was a rejection of State responsibility to take definite positive steps to assist the individual in this process. As has been noted in both Chapters 1 and 2, one sees in the Casey and Bureaucratic period the flourishing of a 'small government' philosophy that was nascent during the Spender period. On this view, the State was not responsible for providing work for all, nor was it responsible to legislate so as to prohibit discrimination in the private sector.[66] Instead, the State's role continued to be defined as creating the general atmosphere conducive to individuals' attainment of their rights. The only exception related to conditions surrounding State intervention in an individual's life. Thus in relation to prosecuting an individual, a State would come under an obligation to provide for fairness of process or, in expelling an alien, there would be a similar obligation of procedural fairness.

As in the Spender period, there was a continued emphasis on human rights only gaining efficacy once States had undertaken a binding legal commitment with respect to such rights. Such an undertaking could be evidenced in the enactment of domestic legislation or the ratification of an international instrument. However, human rights in the more general sense (that is, outside these two contexts) were regarded as rights only in a non-legal sense. There was no discussion, for instance, of the independent effect of human rights in limiting the power or legitimacy of governmental power. Nor was their any fetter on a State's power to select which human rights to recognise and commit to implementing. The endorsement of human rights was a matter for the discretion of States. Neither competing traditions nor conditions 'which were inherent in the nature

[66] For further details, see Chapter 1, 64; Chapter 2, 90.

and growth of organized societies' could be overridden.[67] States had legitimate domestic interests and constitutional barriers to accepting a full range of human rights commitments.[68] Ultimately, States retained the power to make reservations in order to accommodate competing concerns.[69]

Admittedly, Australian representatives occasionally averted to a broader responsibility on States to respect a broader range of 'human rights'. Thus Whitlam argued, in a rather grand fashion in 1954, that States needed to do more than observe the letter of the law. States needed to make a great effort to improve the life of society in such a way as to satisfy the conscience of mankind[70]:

> The ultimate obligation was a moral and spiritual one. Consequently, the limited sxope [sic] of the legal obligations undertaken by federal States was not the full measure of their real commitments.[71]

Before concluding, however, that Whitlam was actively promoting States to take on broader commitments, it is important to recognise the context in which the statement was made. In lauding State's 'moral and spiritual' obligations, Whitlam was attempting to justify curtailment of State's legal obligations at least in the case of federal-States.[72] His recourse to a higher level of obligation was thus a strategy employed to placate States insisting on universal textual obligations for all members of the international community. Certainly, domestically, there was no exhortation for departments and states to enforce moral and spiritual obligations. Indeed, as has been seen in previous Chapters, the Department of External Affairs reassured concerned domestic players that the obligations under the Covenants were tightly constrained and required minimal change to existing legislative policies.[73]

Little changed in the Australian policy up until the finalisation of the Covenants. The Australian delegate, Rowen Osborn in the Third Committee of the General Assembly

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67 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 372, 9; 4 May 1953.
68 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 341, 4-5; 9 April 1953.
69 As to Australian support for a reservations clause, see Chapter 5.
70 HFE Whitlam, Australian representative, UN Doc E/C.4/SR 438, 7; 17 March 1954.
71 *Ibid.*
72 Australia's attitudes towards a federal-state clause is dealt with at length in Chapter 5.
73 This was particularly the case with respect to economic and social rights: see Chapter 1.

made the following comments in welcoming the adoption of the Covenants in November 1966:

> My delegation has supported throughout the idea of elaborating covenants designed to advance the purpose expressed in the UN Charter of promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion...
> As the Committee will be aware, a vote cast at this stage is not in any sense an expression of a State's agreement to be bound by the provisions of the text.
> A further expression of its consent – involving signature, ratification, accession or acceptance – is necessary before the text can become binding.[74]

States drafted Covenants to advance the promotion of human rights, but were not thereby obliged to ratify the Covenants. The statement did not purport to define the content of juridical or justiciable human rights, but reinforced a positivist outlook that stressed the role of States in creating and giving effect to legal human rights guarantees.

This third period of policy development reflected assumptions virtually identical to those operative in the Spender period. Select policies show a continuance of a Liberal Party-induced emphasis on small government and limited intervention in the private sphere. But in large part, the similarities seem to arise out of the continued dominance in the years 1950-1954 of Whitlam's positivist outlook. It proved to be a perspective that was sufficiently attractive to bureaucrats to be continued after Whitlam's involvement ceased in 1955. The approach permitted State interests to be given priority in the drafting process. It also allowed bureaucrats to support the continued developments of the Covenants without committing Australia to support for particular clauses. Through the adoption of such a stance, however, policy-makers during the Spender and Casey periods opened the way for a level of future intellectual confusion. The term 'human rights' was used both in reference to the broader category of 'human rights' in their moral sense, and 'human rights' in their narrower juridical legal sense; and to refer to rights regarded as legal and those regarded as aspirational. Together the Spender and Casey periods thus helped to create a cloak of invisibility surrounding disparate views of the source and nature of human rights.

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[74] RF Osborn, Australian representative, A/C.3/SR 1455, 479-480; 12 December 1966.

B. Identity of Rights' Holders

Throughout Australia's participation in the negotiations of the International Bill of Rights, its delegates affirmed the universality of human rights norms – that is, their application to all individuals. However, this theoretical stance belied the extent to which Australian delegations supported the restriction or non-application of rights to certain groups. In particular Australian delegations consistently undermined the universal application of human rights through their insistence that the Covenants on Human Rights were unsuitable for application to indigenous people of both Australia and external territories, immigrants, and to a lesser extent, women. The standard rights bearer in Australian policy was thus an Anglo-Celtic male.

As has been outlined in Chapters 2 and 3, Australian policy-makers consistently put forward justifications for the non-application of human rights measures to indigenous people. Indigenous people of Australia were not regarded as at a sufficiently high level of civilisation to constitute a minority for the purpose of Article 27 of the ICCPR. Nor were they sufficiently advanced to be able to exercise rights such as freedom of movement or the right to equal pay. So deeply embedded was the belief that indigenous people could not be granted the full range of rights enjoyed by others, that in the parallel development of the Convention on the Elimination of all Forms of Racial Discrimination (CERD),[75] the Australian delegate, Hugh Gilchrist, characterised Australia's legislation as 'protective legislation' that constituted 'special measures' under the terms of the CERD:[76]

> A great number of nations...have minority peoples who, for various reasons of geography or history, have failed to advance at the same rate as other groups of the nations, and for whom special provisions have to be made...in many countries special temporary measures are needed to protect such groups and their culture, while

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75 Convention on the Elimination of all Forms of Racial Discrimination, opened for signature 21 December 1965, entered into force generally 4 January 1969, ATS 1975 No 40.

76 Article 2(2) of CERD obliged States to undertake where necessary 'special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'.

> developing their capacity to live happily and to make their own contribution as an integrated and equal part of a modern nation.[77]

Indigenous people of the external territories were regarded as similarly backward. As was noted in Chapters 1 and 2, Australian delegations advanced the view that, given the existing stages of (under) development of inhabitants of external inhabitants, such peoples needed to be excluded from the scope of the Covenant. This conclusion was regarded as regrettable, but unavoidable. Although the intensity with which this view was put forward varied over time, all Australian delegations considered that indigenous people could not be granted the same level of human rights protection as would apply to non-indigenous Australians. Attempts to argue differently were regarded as either irrational and ill-informed or motivated by more sinister (politically subversive) forces. The benchmark to be used in judging whether the inhabitants of trust territories (or indeed indigenous inhabitants of Australia) had reached a level of development sufficient for all protective legislation to be removed was not stated. However, the underlying premise was that only when such persons became more like their Anglo-Celtic counterparts could they be considered ready for the application of unqualified human rights.

In the case of immigrants to Australia, the process of exclusion was more subtle. Australia did not oppose Article 2 of the ICCPR or the ICESCR in which States undertook obligations with respect to 'all individuals within its territory', regardless of their legal status. However, immigrants were consistently placed in a different category to other persons within Australia. Thus, for instance, justifications were offered for their restricted movements or job prospects.[78] Restrictions on their social security benefits were also seen as justifiable.[79] Most commonly restrictions on immigrants

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77 Statement by the Australian representative, Hugh Gilchrist, to the Third Committee, 1 October 1963, reproduced in Brief for the Australian Delegation to the 20th Session of the General Assembly (1965), in NAA A 1838/1, Item 929/5/5 Pt 1.

78 See Chapter 2, 77.

79 The Department of Social Services were consistently worried about the application of the non-discrimination clause in relation to the right to social security, but were eventually placated on the basis that only progressive implementation was required for economic and social rights: Letter from DH Rowe, Director-General of Department of Social Services, to the A/g Secretary, DEA, 31/7/51, in NAA A 1838/342, Item 929/4/4 Pt 2.

were regarded as being subsumed into the category of permissible limitations related to 'national security' in relation to civil and political rights, or acceptable under a 'progressive implementation' view of economic and social rights.

The rationale for the exclusion of immigrants was several-fold. The strong attachment to the White Australia Policy in the post-World War Two period seems to have been the initial catalyst for the drawing of the curtains around Australia's immigration policies. With the expansion of the immigration policies to include a more diverse range of ethnic groups, the desire for racial homogeneity developed into a desire for cultural homeogeneity and a defence of assimilationist policies. Yet, this insulating of immigration policies appears to have had a longer term effect. Even when the White Australia Policy was being revisited (and formally dropped in 1966), Australian policy was marked by a policy of regarding the immigrant as 'other'. A State could be expected to protect its long-term citizens, but immigrants had to earn the same benefits. Immigrants were thus conceived of as a secondary group within society whose rights could be varied at the whim of the State.

The exclusion of women from consideration as equal rights holders with men was a less conscious process by Australian policy-makers. In general, Australian delegations did not stop to ask whether men and women had different life experiences that might lead to the need to consider the drafting of human rights in such a way as to respond to the lives of both men and women. Even where specific issues arose as to men and women's differential experiences, the Australian delegation was more likely to side with the status quo in the interests of the economy, State politics and community prejudice.

An example of the lack of significance attributed to differentiating between men and women was the failure of successive Australian delegations to respond positively to calls for the use of inclusive language in the international instruments. In 1948, for instance, the Soviet Union had suggested that the draft UDHR's use of the term 'men' reflected the historical mastery of men over women and that it should be altered. The

Australian alternate, Ralph Harry, responded that the terminology problem was insoluble. His solution was to adopt the language of the Charter and the UDHR, thus 'man' and 'mankind', since it was generally taken to include men and women.[80] When the issue was raised again in 1955, Australia was no more enthusiastic about the use of broader language. In reporting back to the Department of External Affairs, the delegation noted that the move from 'men' to 'human beings' had been driven by the Dominican Republic Representative, Ms Bernadino who three years previously had been successful in obtaining the Assembly resolution changing the Spanish text of the Covenants from 'Derechos del Hombre' to 'Derechos Humanas'.[81] The Australian delegation minimised the significance of the proposal by noting that all the sponsors of the move for the English text were female. It concluded that the substitution of 'free human beings' for 'free men' was 'a change for the worse' since 'free men' had strong traditional and historic meaning.[82] Furthermore, it considered that no one would think of interpreting the word 'men' in any exclusive sense. It was only because the Australian delegation considered that the amendment was bound to be adopted that the delegation did not oppose it.[83]

When the inclusion of rights to specifically address the position of women were raised, Australia was generally hostile. Jessie Street, in her personal capacity as the Vice-Chairman of the Commission on the Status of Women in the late 1940s, circulated a draft document concerning the rights of women. It was presented to the Commission on Human Rights for its consideration. It contained such clauses as a right to be free from violence, and a right to financial security.[84] This draft did not receive any analysis from the Australian delegation. It was simply filed in a departmental folder without further comment, indicating a level of marginalisation without parallel in relation to other human rights topics. In other cases, Australian hostility was more overt. When texts of

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80 RL Harry, Australian representative, UN Doc E/CN.4/AC.1/SR 13, 6-7; 20 June 1947.

81 Memorandum from Delegation to the UN to the Secretary, DEA, 9/11/55, in NAA A 432/68, Item 68/2797 Pt 3.

82 *Ibid.*

83 *Ibid.*

84 Proposed Amendments to the International Bill of Human Rights, Report of the Drafting Committee, UN Doc E/CN.4/21, Annex A, in NAA A 461/7, Item G327/1/8.

particular application to women were introduced, such as the equal pay clause, Australian delegations were consistently opposed.[85] When a complaint was sent to the United Nations from an Australian individual concerning the lack of equal pay in Australia, Australia without any seeming qualms cited community opinion as the reason for the unequal pay structure:

> Change in the status of women and the development of the principle of equal pay for equal work depend to a large extent on the pressure of public opinion. At present a large section of the Australian pubic remains unconvinced that women should be granted equal rights with men in such matters and until women have changed the thinking of the Australian public, advance in the status of women can only be slow and the gains small. Similarly the Australian public, as a whole, seems uncertain as to whether married women with children should be encouraged to undertake work outside the home.[86]

This response by Australia is important for signalling the source of Australian reluctance to undertake what would today be called a 'gender analysis' of human rights principles. The Australian delegations saw themselves as mirroring generally accepted community sentiment about the role and importance of women. The negotiation of international standards of human rights was not to be the stage on which Australia challenged such sentiment.

It is evident, therefore, that there were significant gaps in the Australian understanding of a system of universally applicable human rights. In excluding indigenous peoples, immigrants and women from equal policy consideration, Australian policy-makers were reflecting the dominance of continuing prejudice. It was a form of exclusion that equates with what Klaus Gunther has described as a 'process of neutralization':

> at first perceiving a human being as somebody who does not in all respects belong to the community of human beings, and secondly with the right to treat them as something which does not deserve the protection of human rights.[87]

In so far as it was based upon unquestioned assumptions about the nature of the ideal rights bearer, it points to a long-lasting form of myopia.

C. Domestic Significance of Human Rights

Throughout the negotiations of the International Bill of Rights, Australian delegations

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85 See Chapter 1.

86 Letter from KCO Shann for Assistant Secretary, DEA to Australian Mission to the UN, NY, 16/6/54, in NAA A 1838/1, Item 856/13 Pt 13.

87 K Gunther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture' in P Alston (ed), *The European Union and Human Rights*, Oxford University Press, Oxford, 1999, 118.

accepted that international human rights standards were applicable in, and had real consequences for, Australia. Human rights were not regarded as simply a matter related to foreign affairs, to be used in judging the performance of other States, but were looked upon as standards against which the Australian record might be evaluated. Even as Australian policy-makers became focused on limiting the scope of internationally protected human rights, the sense of relevance of the standards to domestic policies was retained. At the same time, the promotion of the view that human rights texts bore a fixed, static meaning had a tendency to increase complacency about the likelihood that Australian standards would be considered to be in breach of the international standards.

The Evatt period was the high water mark for Australia's preparedness to consider and accept the domestic implications for international human rights. In 1946, for instance, the Department of External Affairs approved Geoffrey Sawer's entry in the United Nations *Yearbook of Human Rights* that acknowledged a range of outstanding human rights issues in Australia.[88] Whilst stating at the outset that there was 'probably no country in the world in which human rights...are more extensive or better protected',[89] Sawer proceeded to identify a number of shortcomings in Australia's human rights record. He conceded, for instance, that there was not complete respect for political rights, given the restrictions on the franchise for the upper house in several states, the restrictions on Aborigines and the inadequate representation of the people of Canberra and the Northern Territory.[90] The entry also acknowledged the difficulties in ensuring the right to social security given existing constitutional constraints.[91] Whilst there were definite limits to the preparedness of Australia to amend existing practices (particularly in the indigenous and immigration fields), the Evatt period was to be the most open in acknowledging human rights problems in Australia.

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88 *United Nations Yearbook of Human Rights* 1946, UN Doc E/CN.4 1946, 31.
89 *Ibid*, 31.
90 *Ibid*, 33.
91 *Ibid*, 34.

During the post-Evatt years, there was less frankness in acknowledging publicly areas of inconsistency between human rights standards and Australian practice. Instead, where inconsistencies were perceived, the stance of delegations was more defensive in nature. The object became to seek amendment of the 'offending' human rights guarantees. The fact that the Department of External Affairs undertook regular consultations with Commonwealth departments and the states during the negotiations suggests that decision-makers remained of the opinion that the international human rights standards had potential domestic impact. Yet as the frequency of these consultations increased during the Spender and Casey periods, so too did Australia's attempts to insulate key policies from the scope of human rights guarantees through the proposal of amendments or narrow 'understandings'. Ultimately, it would appear that the bureaucratisation of the process was responsible for this watering-down of Australia's commitment to changing its domestic policies. It was a pattern that was only reversed on occasions when political leaders took particular interest in an aspect of the human rights treaties.[92] Yet, the fact that inconsistencies were still noted points to an underlying acceptance that human rights standards were relevant in the Australian context.

It is noteworthy that Australian human rights policy included few instances of Australia seeking the recognition of particular rights to embarrass other States or to be used in attacking other States. This was not to say that Australian political leaders did not make comments attacking other countries' record on human rights issues. Prime Minister Menzies on the occasion of the 13th anniversary of the UDHR in 1961, for instance, stated:

> It is easy to point where the ideals of the declaration have failed to take root – more than a quarter of humanity today lives under Communist systems of Government which reject the whole concept of individual rights. Yet in the comparatively short period since the declaration was adopted, it is encouraging to see the extent of its influence

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92 In 1961, for instance, as a result of international pressure concerning Australia's aboriginal policies, Cabinet directed the Department of External Affairs and the Attorney-General's Department to review Commonwealth legislation to identify provisions which discriminated against the employment of Aboriginal people and to provide a report on the desirability of removing such discrimination: Cabinet Decision, 23/8/61, referred to in Memorandum from H Gilchrist to the A/g Secretary, DEA concerning Australian Aborigines: External Affairs Interest, 29/8/61, in NAA A 1838/1, Item 929/5/3 Pt 1.

> among men and women in many other countries. We who are privileged to live under the rule of law should do what we can to help the less fortunate members of the world community to overcome tyranny, discrimination and want and to enjoy the individual freedom an dignity to which they aspire.[93]

Similarly, Australian policy-makers blamed Soviet intransigence for delays in the drafting of the Covenants. However, Australian policy-makers never considered changing their attitudes towards clauses on the basis of a strategic advantage to be afforded in amassing ammunition to be used against another State. Instead, Australian policy-makers consistently focused on the implications for the Australian State in accepting or rejecting clauses.

Having noted that all policy-makers viewed human rights as a matter of domestic import, it should also be observed that policy-makers viewed the determination of human rights policy largely as a governmental affair. Admittedly, there was some movement as between the Evatt Ministry and the later Ministries in the dominant view of the role of the government in participating in the negotiations. During the Evatt period, there was an emphasis on the State acting as the agent of the community in seeking to protect the human rights of individuals. It is apparent, for instance, in relation to the Australian delegates' arguments concerning economic and social rights: the government, in fact all governments, would have to be answerable to their population for the stances adopted. Far more common during the post 1949 period was the setting up of an adversarial position between the State and individuals. Community interest was equated with that of the State and opposed to the potentially unruly individual. This was evident in the suspicion cast upon individual Aboriginal activists who sought to draw attention to Australia's discriminatory practices. It is also a factor that is evident in Chapter 6's exploration of implementation practices. In such policies, the State was seen as needing to protect its own interests in the negotiations rather than seek to represent individuals.

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93 13th Anniversary of UDHR: Statement by the Minister for External Affairs, 10/12/61, in NAA A 463/50, Item 65/4844.

Despite these variations, however, in neither the Evatt nor the later periods did the Department of External Affairs seek to involve non-government organisations in the ongoing development of policy. On occasion, copies of the draft documents were sent to organisations such as the United Nations Association. There is no evidence, however, that policy-makers took into account the comments made by such organisations in response. Admittedly the number of non-government organisations was a great deal more limited than it is today. From the limited use made of existing organisations, however, it would appear that policy-makers proceeded on the assumption that the negotiation of treaties was primarily a matter for governmental officers.

Spanning the Evatt, Spender, Casey and Bureaucratic periods was also a conception that human rights standards, once finalised, would have a static and predictable meaning. Whether it be in the confident terms in which advice was provided by Attorney-General's as to the level of consistency or inconsistency between international provisions and domestic law, or in the explanations of the Covenants provided to Australian states and Commonwealth departments in the latter stages of the negotiations, primary reliance was placed on the 'objective' meaning of the provisions. Recourse was had to the drafting histories of provisions to elucidate this meaning. However, there was no indication that the scope of human rights guarantees might change in the future as a result of subsequent State practice. Nor was there attention given to the fact that the 'objective' meaning ascribed to the clause by other States or the international community might be influenced by future comments by the supervisory bodies under the Covenants or the writings of jurists. Furthermore, there were some isolationist tendencies evident with respect to permitting other States or international bodies to question the Australian interpretation of treaty provisions. In May 1950, the Department of External Affairs advised the Australian Mission to the United Nations that they were not prepared to have the 'national security' limitation be subject to review by any international organ.[94] Similarly, in putting forward

[94] Cablegram from DEA to Australian Mission to the UN, NY, 12/5/50, AA A 1838, 856/13 Pt 8.

'understandings' of clauses in the civil and political rights field, there was an implicit belief that such understandings could be used to 'estop' later challenges.

Admittedly, the *Vienna Convention on the Law of Treaties* with its establishment of a regime of looking for common intentions and permitting recourse to future practice of States and adjudicatory bodies was not finalised until 1969. However, given that the overlap between personnel involved in representing Australia in the negotiations on the *Vienna Convention on the Law of Treaties* and providing advice on the ICCPR and ICESCR,[95] one might have expected a more cautious approach to be adopted in predicting the meaning of clauses. The confident prediction of the meaning of the clauses was obviously designed to reassure domestic players (where appropriate) or to justify Australia's stances on particular clauses. The manner in which it was undertaken does suggest, however, a belief that the language of the clauses was sufficiently precise as to be capable of bearing a fixed meaning. Whatever be the motivation, the promotion of such a static, subjective approach is likely to have led to a certain complacency within federal and state authorities. When the Department of Immigration was reassured, for instance that work contracts were not 'forced or compulsory labour' under Article 8 of the ICCPR, or that restrictions on the freedom of movement of migrants did not infringe Article 12(3) of the ICCPR, the Department of Immigration was likely to take the view that their policies had been given a permanent imprimatur. Similarly, when departments were reassured that the 'progressive achievement' nature of ICESCR rights protected existing discrepancies in Australian law from attack, one would not expect departments to feel any compulsion to undertake targeted programmes for the eradication of discrepancies.

Notwithstanding these limitations, it is evident that there was a continuous appreciation of the potential significance of the International Bill of Rights in the domestic scene. Even where enthusiasm for the transformative potential of international human rights

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95 Patrick Brazil, an officer of the Attorney-General's Department was a leading member of Australia's delegation involved in the negotiations of the Vienna Convention on the Law of Treaties and also provided key advice in the 1965-6 period on the meaning of the draft human rights treaties.

was not evident, there remained a sense of vulnerability that made policy-makers seek to reduce the scope of the Covenant.

Conclusion

Despite the continuing rhetorical support given to 'inalienable, universal' human rights, Australian policy-makers did not share a common understanding of the nature of human rights. During the Evatt period moral, political and legal human rights were viewed as synonymous. The responsibility of States, already bound by human rights in the moral and political spheres, was to provide for the international and domestic legal protection of human rights. With the rise of Spender and Whitlam as dominant influences in the 1950s, Australia's policy became marked by an emphasis on the distinct nature of moral human rights vis-à-vis legal human rights. The latter were regarded through a positivist lens such that States could select, shape and amend any pre-existing human rights. Significant gaps also appear between Australia's commitment to the universality of rights and the exclusion of particular groups from being full rights-bearers. Attitudes towards the domestic significance of international human rights standards were similarly mixed. While delegations consistently accepted that the human rights regime had implications for Australian domestic policy, delegations varied as to the balance to be struck between international human rights and domestic interests.

Rather than being able to attribute these changes and divergences to one factor, this Chapter reveals the multiplicity of factors at work. The primary factor appears to have been the personal political philosophies of the policy-makers, in particular Evatt and Whitlam, concerning the powers of the State, the roles of individuals and the divide between morality and law. Of secondary importance overall were the ideological constraints of the Liberal and Labor Parties, particularly in the area of State involvement in the guaranteeing of rights. Equally, however, the bureaucratisation of the process of human rights development in the latter years ensured continued adherence to a positivist, State-centric model of human rights. Given these distinctions

in the period 1946-1966, it is impossible to conclude that as 1966 there was any inevitability about future Australian governments embracing one, universal, view of the role and importance of international human rights.

Chapter 5

The Domestic Implementation of Human Rights

Introduction

> The international law of human rights builds and depends on national law...When a State is deficient in respecting or ensuring human rights, the international law of human rights does not supersede national laws and institutions, but seeks to induce the state to improve them and make them more effective.[1]

The efficacy of international human rights law ultimately depends upon national laws and institutions. To convince States to develop national laws and policies consistent with the standards established in the International Bill of Rights remains one of the primary aims of the international human rights system. Delegates involved in negotiating the International Bill of Rights were aware of the vital interconnection between the provisions of international and domestic law. As representatives of individual States, they were also aware of political and constitutional complexities surrounding the national implementation of human rights. A balance between these two interests thus had to be struck in working out acceptable clauses concerning domestic implementation to be included in the International Bill of Rights.

This Chapter examines Australian policy towards the domestic implementation issue, focusing on three topics of particular concern to contemporary delegates: (a) the general obligation clauses in each Covenant; (b) the inclusion of federal-States clauses; and (c) the inclusion of a reservations clause. It reveals that over the course of the international negotiations, Australia moved away from its initial support for robust obligations on States to legislatively or constitutionally entrench all human rights. In a process that was fuelled by Spender and his successors' adherence to Liberal Party values and the cautiousness engendered by Whitlam and his bureaucratic colleagues, Australia's policies shifted towards advocacy for a scheme of diluted, decentralised domestic implementation.

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1 L Henkin, 'International Human Rights and Rights in the United States', in T Meron (ed), *Human Rights in International Law: Legal and Policy Issues,* Clarendon Press, Oxford, 1984, 25.

A. Obligation Clauses

Overview of the International Debate

The UDHR was recognised as a non-binding declaration of the General Assembly. As such the issue of domestic implementation did not need to be examined in any detail. By a vote of 47 to none with one abstention, the Third Committee adopted an Egyptian Resolution that 'deferred the formulation of principles relating to the duties of States for incorporation to an appropriate instrument'.[2] Debate on domestic implementation thus began in earnest with the drafting of the (then termed) Covenant on Human Rights. With the separation of the draft Covenant into twin Covenants in 1952, the door was opened for separate obligation clauses to deal with each category of rights. The clause drafted for civil and political rights was Article 2 of the ICCPR which read:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
> 3. Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

A different formulation was chosen for the ICESCR. While including a guarantee of non-discrimination, Article 2(1) of the ICESCR obliged States:

> to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

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2 UN Doc A/C.3/222: quoted in J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, 1999, 239.

No reference was made to the granting of remedies for infringements. Developing States were empowered to choose the extent to which they guaranteed economic rights.[3] Given the centrality of these clauses in the two Covenants, it is somewhat surprising to note how little controversy accompanied their drafting.

The domestic implementation clause to be applied to civil and political rights was first discussed in 1947 at the First and Second Sessions of the Commission on Human Rights.[4] Even at this stage it was envisaged that the clause would not be extended to economic and social rights. The draft clause prepared in 1948 thus referred to rights and freedoms in 'part II' of the draft Covenant, limiting it to civil and political rights.[5] With the exception of the non-discrimination element (which arose only in 1949), the 1948 draft clause contained the major elements of the eventual Article 2: the obligation to adopt laws where necessary and to provide judicial or other remedies for breach of rights.[6] The major issue of contention was whether permitting States time to 'take the necessary steps' constituted a negation of immediate obligations. Despite vehement opposition towards this aspect of the clause from the United Kingdom in 1950-1952, the Commission on Human Rights adopted the clause in its present form in 1952.[7] It was adopted, unamended, by the Third Committee of the General Assembly in 1963.[8]

Article 2 of the ICESCR was not conceived until several years into the drafting process. Indeed, it was only at the Seventh Session of the Commission on Human Rights in 1951, that the Commission first attempted to draft an umbrella clause to cover State obligations.[9] When the clause was discussed in the Commission on Human Rights in 1952 and the General Assembly in 1962, debate centred around whether or not the obligation should be 'progressive' and to what extent States were required to take

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3 Article 2(3) ICESCR.

4 MJ Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, 49-50.

5 The draft clause is contained in UN Doc E/800, quoted by MJ Bossuyt, *op cit*, 50.

6 *Ibid.*

7 *Ibid*, 72.

8 *Ibid.*

9 See MCR Craven, *The International Covenant on Economic, Social and Cultural Rights,* Clarendon Press, Oxford, 1995, 116.

legislative steps to achieve economic and social rights.[10] The final text of Article 2(1) was adopted by the Commission on Human Rights in 1952 and endorsed by the Third Committee of the General Assembly in 1962.[11]

I. Evatt Period

During at least the early stages of the Evatt period, Australia was an advocate for stringent, ambitious methods of domestic implementation of human rights. Its preferred model of domestic implementation extended far beyond the realms of Article 2 of either the ICCPR or ICESCR. Australia suggested that States be required to incorporate human rights into their 'fundamental law'. 'Fundamental law' was a generic term used to refer to the foundational law of States. The proposal was first aired and given its fullest exposition at the Paris Peace Conference in 1946.[12] The intention was that human rights would become a permanent aspect of the legal order of States. As part of this proposal, States would guarantee that individuals could challenge administrative or legislative action where their human rights were being threatened. [13] In States where courts had the power to review the constitutionality of Acts of the legislature, human rights would become part of the standards used in the review through their inclusion in the constitution. In systems where parliamentary supremacy was untrammelled by judicial review, two possibilities were foreshadowed.[14] The court could make use of its statutory interpretation functions to read down provisions that appeared to be inconsistent with human rights in an enacted 'fundamental law' unless the intention to abrogate such human rights was express.[15] Even in cases where the intention to

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10 For a fuller version of the history of Article 2(1) of the ICESCR, see MCR Craven, *op cit*, 107-134.

11 *Ibid.*

12 The Paris Peace Conference of 1946 negotiated the peace treaties between the Allies and Rumania, Bulgaria, Hungary, Finland, Austria and Germany. Early drafts of a treaty between the Allies and Italy were also discussed. In the context of the Italian peace treaty, Australia proposed the inclusion of the following text: 'Italy undertakes that, in order to fulfil its obligations under paragraph 1 of this article, those obligations shall be recognized as fundamental laws and that no law, regulations or official action shall conflict or interfere with those obligations, nor shall any law, regulation or official action prevail over them': included in paper on 'Fundamental Law', Annex H, to Brief to Paris Conference, in NAA A 1067/1, Item E46/38/28.

13 *Ibid.*

14 *Ibid.*

15 *Ibid.*

abrogate human rights was express, courts were not powerless. Their role in such circumstances was to draw the disconformity to the attention of the legislature and the United Nations.[16]

Australia's enthusiasm for this proposal was not particularly long-lived. Having succeeded in having a 'fundamental law' option included in the report of the Commission on Human Right's Working Group on Implementation in 1947,[17] Australian representatives adopted a lower profile on the issue in 1948 and 1949. The issue was not, for instance, raised by the Australian representative in the context of the deliberations of the Second Session of the Drafting Committee for the Covenant in 1948. The change of heart came in the midst of a growing recognition of the difficulties Australia would face in changing its own fundamental law, the Commonwealth Constitution. A Department of External Affairs memorandum written in June 1948 noted that the Australian Constitution could only be changed by referendum. Referendums were described as 'notoriously difficult' to win.[18] Constitutional experts writing in 2001 would be unlikely to disagree with this sentiment. In 1948, there was particular sensitivity over the issue given the Labor government's failure to convince a majority of the Australian population to endorse any of its proposals for constitutional change in 1944, 1946 or 1948.[19] An Australian delegate to the Commission also reported back to the Department the lack of support from other States, drawing attention to the particular hostility demonstrated by the United States.[20] By 1949, the Australian Mission to the United Nations was directed 'not to push the issue'.[21] Whilst appropriate

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16 *Ibid.*

17 Report of Working Group on Implementation, Annex C to Commission on Human Rights, 2nd Session Report to the Economic and Social Council, 36, UN Doc E/600, 6 ESCOR Supp 1 (1948).

18 Memorandum from AH Loomes, to the Secretary, DEA, 29/6/48, in NAA A 1838/1, Item 856/13/7 Pt 1.

19 For the questions put to the Australian people and the results, see T Blackshield, G Williams, B Fitzgerald, *Australian Constitutional Law and Theory: Commentary and Materials*, Federation Press, Sydney, 1996, 969-70. As an indication of the abysmal record of successful referenda, of the 23 proposals put to the Australian people on 11 occasions in the period 1906-1948, only four proposals were carried, based on the results presented in T Blackshield, G Williams, B Fitzgerald, *op cit*, 964-970.

20 Report of the Australian Alternate on Human Rights Drafting Committee, 2nd Session, (1948), in NAA A 1838/1, Item 856/13/7 Pt 1.

21 Memorandum from the A/g Secretary, DEA to Australian Mission to the UN, NY, 28/4/49, in NAA A 1838/1, Item 856/13/7 Pt 3.

in the context of the Peace treaties, the Department of External Affairs regarded the proposal as 'less appropriate now where the contracting parties are well-established States with long-operating written or unwritten constitutions'.[22]

Having given up on the compulsory constitutional entrenchment of human rights, Australia's support switched to proposals requiring States to enact legislation to protect and promote human rights. Australia supported all references in the earliest drafts of Article 2 of the ICCPR to States being required to take legislative steps to ensure individuals' enjoyment of human rights.[23] Similarly, in the substantive clauses of the Covenant, Australia advanced specific amendments to impose more specific legislative responsibilities, such as those relating to the non-discrimination obligation.[24] Australia did not share the United Kingdom's concern that States should only be able to accede to a treaty when they were able to fully implement its terms.[25] Instead, Australia, along with States like the United States and Denmark, argued that States might properly ratify the Human Rights Covenant and proceed, 'within a reasonable period of time', to fully implement the terms of the Covenant.[26] In an attempt to make this feature clearer, the Australian delegation proposed at the Fifth Session of the Commission on Human Rights in 194 that the words 'within a reasonable time' be added to Article 2.[27] Australia was thus prepared to recognise a transitional period for States to ensure that their legal systems complied with international human rights and to take the necessary steps to legislatively protect human rights.

Australian delegates also voted for recognition of an individual's right to an effective remedy for breach of human rights. In 1948, the draft clause of the Commission on Human Rights stated:

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22 *Ibid.*

23 This included support for a United States proposal that stated States would take 'legislative and other measures' to give effect 'as a matter of domestic law' to the rights in the Covenant: UN Doc E/CN.4/SR 125, 17 quoted in MJ Bossuyt, *op cit*, 59.

24 Discussed in Chapter 2, 81.

25 As to the United Kingdom's stance, see UN Doc E/CN.4/SR 138, discussed in UN Doc A/2929, quoted by MJ Bossuyt, *op cit*, 58.

26 See MJ Bossuyt, op cit, 59.

27 Australia made this suggestion orally: UN Doc E/CN.4/SR 125, 17; quoted by MJ Bossuyt, *op cit*, 59.

> any persons whose rights or freedoms as herein defined are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.[28]

In referring only to an 'effective remedy' rather than a 'judicial remedy', the clause gave a wide discretion to States to fashion the appropriate remedy. However, the Australian Briefs for the period do not indicate any concern to have the general wording adopted in order to prevent an obligation to provide 'judicial remedies' arising.

Australia's policy with respect to the implementation of economic and social rights is less clear. As was outlined in Chapter 1, in speeches defending the inclusion of economic and social rights in the draft Covenant, Australian delegates supported the view that States should be under obligations to take immediate action (legislative or otherwise) to ensure the rights. In relation to the UDHR, for instance, Australia was one of the initiators of Article 22 which recognised each individual's right, *inter alia*, to 'national effort' aimed at the realization of economic, social and cultural rights.[29] In the six rights forwarded to the Commission on Human Rights for its consideration in 1949, there were references to the State limiting work hours 'by law', establishing and maintaining machinery for minimum wages and conditions and taking action to ensure persons have an opportunity for useful work.[30] In the absence of any draft clause on the implementation of economic and social rights, however, it is difficult to ascertain whether the Australian delegation would have supported identical implementation provisions for all types of rights.

Indeed, there is at least some evidence suggesting that Australian delegates would have shied away from granting judicial remedies for breaches of economic and social rights. In the context of defending economic and social rights, Australian delegates acknowledged that international implementation of such rights might take a different form from that suitable for civil and political rights. Whereas civil and political rights could be made the subject of inquiry by a court or commission, economic and social

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28 UN Doc E/800, Article 2, quoted in MJ Bossuyt, *op cit*, 64.

29 Report of the Australian Representative to the Third Session of the Commission of Human Rights, in NAA A 1838/278, 856/13 Pt 3.

30 Discussed in Chapter 1, 40.

rights lent themselves to scrutiny by a specialised agency.[31] Although these comments were made in the context of discussing international implementation, it is conceivable that had the delegation been pressed on the issue, it would have conceded that a similar distinction should be made in the domestic sphere.

Notwithstanding this residual question mark over Australian policy concerning the domestic implementation of economic and social rights, it is apparent that Australia during the Evatt period supported the imposition of extensive obligations with respect to the implementation of human rights. As with its contemporary stance on economic and social rights and international implementation, Evatt seems to have been the mastermind in developing these policies. Such policies sat comfortably with Evatt and his Labor colleagues' willingness for government to take legislative action to protect human rights, a topic discussed in Chapters 1 and 2.

II. Spender Period

During the Spender years, there was much less consideration given to the issue of the obligations clauses to be included in the Covenant. In part, this reflects the focus in the Sixth Session of the Commission on Human Rights in 1950 with the overarching question whether there were to be one or two Covenants, an issue that was not to be resolved until after Spender's departure from office. Even in the debates that arose, however, Australia adopted a relatively low profile.

Looking at the statements that were made, one notices a widening gap between Australia's policies with respect to the domestic implementation of civil and political rights and economic, social and cultural rights. In relation to Article 2 of the ICCPR, Australia maintained support for reference to a State's obligation to 'take the necessary steps' to implement civil and political rights.[32] The United Kingdom was pushing to

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31 See Statement of Australian representative to Third Committee of the General Assembly, quoted in Memorandum from the A/g Secretary, DEA to the Australian Mission to the UN, 28/4/49, in NAA A 1838/1, Item 856/13/7 Pt 3; and Letter from EJR Heyward, Australian Mission to the UN to the Secretary, DEA, 11/6/48, in NAA A 1838/1, Item 856/13/7 Pt 3.

32 See for instance, HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 194,4; 16 May 1950.

have this reference deleted altogether on the basis that States had to fully implement the clauses before entry into the treaty.[33] Australia's response was much as it had been in the Evatt period – States needed a period of time in which to ensure compliance with the human rights standards.[34] Given that Article 2(1) of the ICESCR was not drafted until 1951, there was no specific debate on the topic of an overall obligations clause for economic and social rights. However, in the debates on the substantive economic and social clauses to be recognised there was a movement away from the undertaking of extensive State legislative responsibilities. As has been discussed in Chapter 1, Australian policy-makers shifted the fulcrum towards individual efforts to achieve rights and away from State action through the introduction of the concept of 'mutuality of obligations'.[35] State action would only be undertaken in exceptional instances. It was a dual conceptualisation of domestic implementation that was to flourish in the Casey and bureaucratic periods.

III. Casey and Bureaucratic Period

The most significant changes in Australian approach to the domestic obligations clauses of the human rights instruments occurred during the Casey and Bureaucratic period of policy development. These changes related to Australia's conception of the role of the State in realizing and guaranteeing rights, the nature of distinctions between categories of rights and the ideal relationship between different spheres of government, in particular, the legislative, judicial and administrative branches. Rather than embracing the State's responsibility to transform national policies and laws to meet human rights standards, Australian policy favoured more limited, diluted forms of State obligations.

Australia's policy with respect to the domestic obligation of civil and political rights became characterised by an emphasis on a State's duty to 'respect', rather than 'protect' or 'promote' human rights. Passive rather than active elements of obligation were stressed. The 1955 Brief for Australian delegates to the 10th Session of the General

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33 The United Kingdom's views are recorded in UN Doc E/CN.4/374, and UN Doc E/CN.4/SR 194, quoted in MJ Bossuyt, *op cit*, 58.

34 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 194,4;16 May 1950.

35 See Chapter 1, 52.

Assembly, for instance, a Brief that was used as the basis for instructions to delegations in the 1955-1961 period, concluded that Australia should support the United Kingdom's push for deletion of Article 2(2) of the Covenant.[36] It did not refer to Australia's previous stance on the issue. Instead, it stated that Australia should support deletion of the reference to a State taking 'legislative and other measures' and offer its understanding that civil and political rights required immediate, pre-ratification implementation.[37] The United Kingdom proposal for deletion of the Article was not supported by a majority of the Commission on Human Rights. Nonetheless, Australia reiterated its concerns about Article 2(2) in 1963, eventually abstaining on its adoption.[38]

Australia's stance on Article 2(2) had an element of 'double-speak'. The clause was described as weakening the Covenant, such that its deletion would lead to a strengthening of the Covenant's provisions.[39] However, behind these words was a narrow conception of the State's responsibilities in the field. As indicated by the 1955 Brief to the General Assembly, Australia was resolutely opposed to imposing an obligation on States to take ongoing legislative measures.[40] From the parallel Australian hostility towards clauses referring to the need for States to enact protective legislation against discrimination (Article 26), the prohibition on racial hate speech (Article 20), or arbitrary interferences with privacy or life (Articles 17 and 6 respectively),[41] it can be surmised that Australia did not wish to undertake obligations to eradicate breaches of human rights, particularly those that occurred in the private sphere. By referring to immediate obligations, Australia seems to have been endorsing a 'one-off' review of legislation to ensure that no State laws directly offended human rights principles. In the Brief for the 18th Session of the General Assembly in 1963, for

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36 Brief for the Australian Delegation to the 10th Session of the General Assembly, in NAA A 1838/1, Item 856/10/10/9 Pt 3.

37 *Ibid.*

38 Final votes on Article 2(2) are recorded in UN Doc E/CN.4/L1259: MJ Bossuyt, *op cit*, 63.

39 Internal Memorandum from 'JPP' to T Doig, annotated by Doig, 13/11/63, in NAA A 1838/1, Item 929/4 Pt 19.

40 Brief for the Australian Delegation to the 10th Session of the General Assembly, in NAA A 1838/1, Item 856/10/10/9 Pt 3.

41 Discussed in Chapter 2.

instance, it was stated that Australia did not intend to accede or ratify until local laws, at both the Commonwealth and state levels, were in accordance with the provisions of the Convention. Once this action was taken, it was anticipated there would be no need for further legislative action.[42]

Not all within the Department of External Affairs agreed with the policy of opposing Article 2(2). William Doig, a senior Department of External Affairs official, annotated a memorandum from the Australian Mission to the United Nations concerning Australia's policy of continued opposition to Article 2(2) with the words 'but it doesn't say why we should except on follow [sic] Big Brother principle'.[43] Doig clearly thought Australia's stance was dictated by allegiance to the United Kingdom. Particularly in the period following the departure of Whitlam from the scene, allegiance to the United Kingdom may well have played a major role in policy development. Predating the British influence, however, was the increased hostility to active State action in implementing human rights in the Spender and early Casey periods.

Whitlam, as Australian representative to the Commission on Human Rights in the early 1950s, was prominent in arguing that States should have discretion with respect to the methods of enforcement best suited to their domestic contexts.[44] In respect of the Australian State, Whitlam had on occasion proferred the view that the common law offered the most appropriate means of protecting human rights.[45] It was a confidence shared by the then Secretary of Attorney-General's Department, Kenneth Bailey. Bailey was called upon to draft a response for Prime Minister Menzies' use to explain why the terms of the UDHR had not been incorporated into the Australian Constitution. Bailey commented on the generality of the text of the UDHR and the danger that such a

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42 Brief for the Australian Delegation to the 18th Session of the General Assembly, in NAA A 1838/1, Item 929/4 Pt 19.

43 Memorandum from 'JPP' to T Doig, annotated by Doig, 13/11/63, in NAA A 1838/1, Item 929/4 Pt 19.

44 See for instance Whitlam's arguments concerning non-discrimination and remedies following wrongful conviction, discussed in Chapter 2, 91.

45 *Ibid.*

text would be given an unduly restrictive or misleading interpretation by Courts.[46] His strongest arguments related to the sufficiency of the current common law to protect freedoms:

> However, the real objection is that, were the rights and freedoms contained in the Declaration to be translated into terms of legal obligations and included in the Commonwelath Constitution, they would make little, if any addition of substance to the rights and freedoms already enjoyed by the Australian people under the ordinary law of the land. As the Rt. Hon. Lord Justice Denning, speaking recently on 'Freedom under (English) Law' said, particularly in relation to freedom of mind and conscience, 'The system which has been built up by our forefathers over the last 1000 years suits our people because it is the best guarantee of our freedoms. The fundamental safeguards have been established...' These remarks are as applicable to the Australian system of law as they are to the English system, for both peoples enjoy the same heritage of freedom.[47]

Given the context of Bailey's comments, shadow-writing for Prime Minister Menzies, it is possible that Bailey did not personally adhere to this point of view. It may be that Bailey was basing his comments on Menzies' preference for a Diceyan-style reliance on the common law and parliamentary sovereignty to protect human rights.[48] Regardless of Bailey's personal views, it is clear that Whitlam saw the traditional British reliance on the common law something to be proudly protected. It is also likely that Whitlam, working under a Liberal administration, was aware of the Liberal Party's aversion to governments 'interfering' in the lives of individuals.[49]

Paragraph 2 was not the only element of Article 2 to come under attack from Australian policy-makers. During the 1950s, Australia also objected to draft Article 2(3)'s requirement that judicial remedies were available for breaches of rights. While happy to consider a softer form of wording such as the 'legislation and practice of States Parties shall be directed towards the development of judicial remedies', Australian Briefs instructed Australian delegates that the reference to judicial remedies was unnecessary and of value only to countries in which the rule of law was not firmly established.[50] Again, this opposition seems linked to a desire to maintain the status quo

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46 Memorandum from KH Bailey, Secretary, Attorney-General's Department to Secretary, Prime Minister's Department, 26/2/52, in NAA A 462/21, Item 575/1.

47 *Ibid.*

48 Menzies clearly ascribed to the views expressed by Bailey: see for instance, Sir Robert Menzies, *Central Power in the Australian Commonwealth*, Cassell, London, 1967, 52.

49 Discussed more fully in Chapter 1, 59-60.

50 Brief for the Australian Delegation to the 10th Session of the General Assembly, in NAA A 1838/1, Item 856/10/10/9 Pt 3.

in Australia and avoid the need for the creation of additional entitlements to seek judicial remedies.

More satisfaction was evinced with draft Article 2(1) of the ICESCR, essentially because it was seen to represent a minimal obligation on the State. As Chapter 1 has revealed, as early as July 1951 Whitlam stressed the *progressive* nature of economic and social rights domestically and internationally.[51] This emphasis was to remain a consistent feature of Australian general support for the ICESCR. It even served as the basis for Australia's challenge to the inclusion of an anti-discrimination clause in the ICESCR. Australia objected that the clause improperly implied an immediate obligation on States to afford economic and social rights to all, whereas States had recognised that rights could be achieved only progressively.[52] Behind the stress on the progressive nature of State obligations appears to have been a belief that it was not possible to provide exact benchmarks for standards of achievement. No attempt was made in internal discussions or public debate to quantify what would be considered 'progressive achievement' in any particular field. Instead, the prevalent complacency indicated a belief that the 'necessary steps' to progress could be judged by the individual State. Thus, in both the areas of civil and political rights and economic, social and cultural rights, Australia was supporting the possibility of minimal levels of government action and high levels of government discretion in implementing human rights.

The journey between the Evatt period and the Casey and Bureaucratic periods was thus one of dramatically contrasting contours. Inspired by varying personal political philosophies of actors, party-political pressures and bureaucratic caution, Australia moved from an enthusiastic embracing of expansive State obligations towards an emphasis on State discretion and minimal State action. In the area of economic and social rights, the movement was more predictable given some reservations in the

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51 Discussed in Chapter 1, 67.

52 Copy of Statement by Australian Representative on Article 2 of the Draft Covenant on Economic, Social and Cultural Rights, circa 1/12/55, in NAA A 432/68, Item 68/2797 Pt 3.

earliest period concerning the nature of economic and social rights. As the next part will show, this movement was to be repeated in the debates over a federal-State clause.

B. Implementation in a Federal State

International law tends to operate on the assumption that States ratifying treaties possess the means of immediately implementing treaty obligations in the domestic setting. The reality faced by States is that implementation of international obligation is a topic bedevilled by questions of considerable political and constitutional complexity. In States with separate and independent executive, legislative, and judicial branches, for instance, the branch that authorises entry into a treaty may or may not have the necessary legislative or administrative authority to implement it. Federal States face an additional diffusion of power, with power being divided between a central authority and constituent units, most commonly called provinces or states. During the negotiations of the International Bill of Rights, the issue of whether any special concession should be made for federal States attracted particular attention. As a result of Evatt's commitment to protecting maximum powers of the central government to legislate with respect to external affairs, the initial Australian approach was cautious. However, by the Spender and later periods, a more conservative view of likely Commonwealth power together with a party-political emphasis on federalism combined to produce strong support for limitations on the obligations of federal States. Even though Australia was ultimately unsuccessful in its campaign to have such a limitation included in either Covenant, its consistent stress in the domestic and international spheres of the importance of such a clause led to it being regarded as 'received wisdom' that the implementation of human rights was most properly considered a matter for state governments.

Overview of the International Debate

The need to clarify the obligations to be undertaken by federal States was raised at an early stage of the debates on a draft Covenant on Human Rights. The earliest clause adopted on this topic permitted federal States considerable latitude in the domestic obligations they assumed. In 1948, for instance, the Drafting Committee of the Commission adopted a text similar to that employed in the Constitution of the International Labour Organisation.[53] It read:

> In the case of a Federal State, the following provisions shall apply:
> (a) With respect to any articles of this Covenant which the Federal Government regards as wholly or in part appropriate for federal action, the obligations of the Federal Governments shall, to this extent, be the same as those of parties which are not Federal States;
> (b) In respect of articles which the Federal Government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons, the Federal Government shall bring such provisions, with favourable recommendation, to the notice of the appropriate authorities of the states, provinces or cantons at the earliest possible moment.[54]

It was designed to permit central authorities to be responsible only for those parts of the Covenant that were 'appropriate for federal action'. However, within two years, the tide had changed. At the General Assembly in 1950, there was a determined push to remove the clause on the basis that it was inequitable to allow some States to implement only some of the human rights in the Covenant. The Fifth Session of the General Assembly, in a close decision, resolved that the Commission on Human Rights 'study' the problem 'of securing the maximum extension of the Covenant to the constitutional units of federal states and meeting the constitutional problems of federal states'.[55]

Debate continued to rage in the Commission on Human Rights. Further texts were proposed by the United Kingdom, Denmark, the United States, Australia and India. On each occasion in the 1950-53 period, the proposals were either not voted on or consideration of their merits postponed.[56] In 1954, the Soviet Union proposed an alternative text ruling out any special rules for federal-States:

> The provisions of the Covenant shall extend to all parts of federal states without any limitations or exceptions.[57]

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53 Instrument for the Amendment of the Constitution of the International Labour Organisation of 28 June 1919, as amended, entered into force 20 April 1948, ATS 1948 No 8.

54 E/800, Article 24; quoted in MJ Bossuyt, *op cit*, 762.

55 GA Resolution 421C (V),. 4 December 1950, 5 UN GAOR Resolutions Supp No 20, 42 (1950).

56 See MJ Bossuyt, *op cit*, 763-765.

57 UN Doc E/CN.4/L340/Corr 1, quoted by MJ Bossuyt, *op cit*, 766.

It was adopted by eight votes to seven (with three abstentions) in 1954[58] and despite the expression of concern by federal States in the 1960's, its inclusion in both the ICESCR and ICCPR was approved unanimously in 1966.[59]

Before considering the attitudes adopted by Australian policy-makers towards the inclusion of a 'federal-State' clause, it is necessary to understand the legal background against which policy choices were being made.

The Legal Framework of Federalism in Australia

Australian policy-makers approached the issue of a federal-State clause with knowledge of two complexities in the Australian legal system. The first was that, as Australia's legal system incorporated a dualist separation of international and domestic law,[60] the provisions of the international treaties would have no substantive effect in Australian domestic law unless and until they were incorporated in domestic legislation.[61] The second was that it was unclear as to whether the Commonwealth government possessed authority under the Commonwealth Constitution to legislate with respect to human rights. In 1901, when the Australian colonies joined to form the Commonwealth of Australia, power was divided between the Commonwealth and the states. The division of power was embodied in the Commonwealth Constitution. The states retained plenary power to legislate for the 'peace, welfare and good government' of their state, subject only to the primacy of Commonwealth laws[62] and some very limited exclusive

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58 UN Doc E/CN.4/SR 450,4, quoted by MJ Bossuyt, *op cit*, 766.

59 UN Doc A/C.3/SR 1437, quoted in MJ Bossuyt, *op cit*, 766.

60 Under the dualist theory, international law and domestic law systems are regarded as distinct legal systems. International law owes its existence to the collective will of States and governs the behaviour of States. Domestic law owes its existence to the sovereign or the populace of the individual State and governs individuals within that State. For a fuller investigation of this dualist theory, see H Lauterpacht, *Oppenheim's International Law*, (8th ed), Longman, Essex, 1955, 37-39. As to the Australian legal system's adoption of this conceptualisation, see R Balkin, 'International Law and Domestic Law', in S Blay, R Piotrowicz, M Tsamenyi, *Public International Law: An Australian Perspective*, Oxford University Press, Melbourne, 1997, 119-145.

61 *The Parlement Belge (1878-79) 4 PD 129.* Rules of international law were permitted to have some indirect effect – primarily in application of the assumption in statutory interpretation that parliament did not intend to infringe international law: *Jimbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 per O'Connor J; There were also comments in the 1949 High Court decision of *Chow Hung Ching* v *The King* (1949) 77 CLR 449 hinting at a broader influence of the rules of international law: discussed in R Balkin, *op cit*, 121-122 .

62 Section 109, Commonwealth Constitution.

areas of Commonwealth power.[63] *Prima facie*, the states could legislate with respect to all human rights matters. However, the Commonwealth government, being a government of limited powers, would have to justify any enactment by reference to the specific heads of powers granted to it under section 51 of the Constitution.

From the list of designated legislative powers given to the Commonwealth, it was apparent that the Commonwealth had few subject-specific powers that would enable Commonwealth legislative implementation of human rights guarantees. Potential sources of authority included its power in relation to industrial disputes extending beyond the boundaries of one state,[64] power with respect to corporations,[65] power over the territories,[66] and after 1947, power with respect to social services.[67] Even collectively, however, such powers could not underwrite Commonwealth enforcement of human rights legislation. The only clause offering the potential of such broad coverage was the Commonwealth's power with respect to 'external affairs' in section 51(xxix) of the Constitution. In the years 1946-1966, the scope of this clause remained unclear.

Throughout the period of the negotiations of the International Bill of Rights, the leading authority on the scope of the external affairs power was the 1936 High Court decision of *King v Burgess; ex parte Henry* (the '*Henry* case').[68] In the *Henry* case, the Court was asked to determine the validity of provisions of the *Air Navigation Act 1920* (Cth) which empowered the Governor General to make regulations 'for the purpose of giving effect to the Paris Convention for the Regulation of Aerial Navigation'. Australia had become a party to this Convention in 1919. Members of the High Court adopted different tests for determining the scope of the Commonwealth's power to pass legislation implementing treaties. Evatt and McTiernan JJ took the broadest view, concluding that once Australia entered a treaty, the Commonwealth had legislative

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63 Section 52 of the Constitution gives the Commonwealth exclusive powers in relation to the seat of government, the Commonwealth public service and Commonwealth public lands.

64 Section 51(xxxv) of the Constitution.

65 Section 51(xx) of the Constitution.

66 Section 122 of the Constitution.

67 Section 51(xxiiiA) of the Constitution.

68 *King v Burgess; ex parte Henry* (1936) 55 CLR 608.

power to implement its terms. The fact that an international convention had been made on a particular subject brought the subject matter in so far as it was dealt with in the convention into the field of section 51(xxix).[69] Dixon and Starke JJ adopted a narrower test, requiring the subject matter of the treaty to be itself 'international' in character before s 51(xxix) powers were attracted.[70] Latham CJ's position was that the subject matters must concern the 'amicable living together of States in a worldly neighborhood'.[71] All members of the Court considered that the Convention in question in the case met their tests, so that the differences did not influence the result of the case. Not until 1983 was the ambiguity surrounding the appropriate test to be applied in determining the limits of s 51(xxix) laid to rest by the High Court.[72]

The uncertainty as to the extent of the Commonwealth's power to legislate so as to implement treaties was reflected in academic commentaries of the time. Writing in the 1960s, PH Lane, for instance, detailed the division of opinion without drawing any conclusion.[73] He did note, however, that on the narrow view of the power, the Commonwealth was unlikely to have power to implement international provisions concerning such 'internal' matters as International Labour Organisation conventions on working hours.[74] Yet, the fact that one of the proponents of the 'broad view' was Justice Evatt, who was later to become the Minister for External Affairs, had obvious ramifications for the policy adopted in the early stages of the negotiations concerning the International Bill of Rights.

I. Evatt period

During the Evatt period, Australian policy-makers were cautious in their approach to a federal-State clause. Perhaps not surprisingly, in light of Evatt's expressed views in the *Henry* case, policy was informed by the belief that the High Court might well uphold

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69 *Ibid*, 681.
70 *Ibid*, 669.
71 *Ibid*, 658.
72 *Commonwealth v Tasmania* (*the Franklin Dam* case) (1983) 158 CLR 1. A majority of the Court adopted the broad test used by Evatt and McTiernan JJ in the *Henry* case.
73 PH Lane, *Some Principles and Sources of Australian Constitutional Law*, Law Book Company, Sydney, 1964, 173.
74 *Ibid.*

the Commonwealth's power to legislate so as to implement the human rights treaties. In 1947, for instance, the Department replied to a query from Colonel Hodgson, Australia's first representative on the Commission on Human Rights, as to the extent of Commonwealth power in the following terms:

> There have been no developments since 1939 in position regarding External Affairs power. Position is that it is believed that the Court would uphold power of Commonwealth to legislate for implementation or treaty where it took view that subject matter of same was genuinely one of international interest.[75]

The test applied was that which had been forthcoming from the Attorney-General's Department in relation to other Conventions including the Maritime Convention on Wages, Hours of Board Ship and Manning,[76] and appears to have been regarded as a test that would fulfil the requirements established by Evatt, McTiernan, Starke and Dixon JJ in the *Henry* case.

Australian policy-makers had in other contexts received directions from Evatt to avoid doing anything that would prejudice the High Court's approval of Commonwealth action implementing treaties. In relation to the negotiations of the World Health Organisation conventions, for instance, Evatt had insisted that Australia not support a federal State clause,[77] notwithstanding the advice of Whitlam as Crown-Solicitor that Australia might support a compromise proposal that stressed the international nature of the conventions.[78] The only international instrument in which Australia supported a federal-State clause was in the International Labour Organisation Constitution, though the reasons for this stance are not clear.[79] There is no record of any expression of views by Evatt in relation to the draft human rights Covenant. However, Australian policy-makers opted for a low key approach to the issue.

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75 Cablegram from DEA to Australian Delegation, Geneva (For Hodgson), 5/12/47, in NAA A1838/278, Item 856/13/2.

76 Quoted in memorandum on Federal State clauses, undated, post 5th Session of the Commission on Human Rights (1949), in NAA A 1838/1, Item 929/4/6 Pt 1.

77 *Ibid.*

78 *Ibid.*

79 KH Bailey, 'Australia and the International Labor Conventions' (1946) 54 *International Labour Review* 285.

In early 1948, EJR Heyward of the Australian Mission to the United Nations supported a federal State clause that obliged the federal government to take action in areas 'which the Federal Government regards as appropriate for Federal action'.[80] Heyward regarded this formula as acceptable since it permitted, but did not require federal action, and did not purport to define the realm of areas 'appropriate for Federal action'.[81] In May 1949, the Department of External Affairs stressed to the delegation that if a federal clause was to be included, the delegation should insist on retention of this formulation.[82] While the United Kingdom resented the possibility of federal states being subject to less obligations than colonial powers, and the United States opposed the formulation on the basis that its demarcation of responsibilities was not sufficiently clear, Australian policy-makers welcomed the flexibility inherent in the proposed clause.[83]

Up until the end of the Evatt period in December 1949, Australian delegates displayed more interest in the form of any federal-State clause than whether or not a clause should be included or excluded. The imperative was to ensure that nothing in the instruments should serve to undermine the possibility of Commonwealth legislative action. In November 1949, the delegation was instructed that a federal State clause was 'not necessary, but that opposition to the insertion of such a clause should not be carried to lengths which would exclude the adherence of important federal states'.[84] The delegation was further instructed that it was desirable to use a form of words that could be used in other conventions dealing with social and economic matters and thus suggested continued support for the International Labour Organisation Constitution formulation (adopted in 1948 and discussed above) on the basis that it left 'maximum

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80 Memorandum from EJR Heyward for the Minister of the Australian Mission to the UN, to the Secretary, DEA, 11/6/48, in NAA A1838/1, Item 856/13/7 Pt 2.

81 *Ibid.*

82 Cablegram from DEA to Australian Delegation, NY, 27/5/49, in NAA A 1838/1, 856/13/7 Pt 3.

83 Comments of Delegate included in memorandum from DEA to the Secretary, Attorney-General's Department, 14/4/49, in NAA A1838/1, Item 856/13/7 Pt 2. This approach brings to mind Gillian Triggs' comment: 'Resorting to deliberately ambiguous words and phrases, variously described as creative, contrived, emotive and purposeful has been a time-honoured technique in the treaty making process': G Triggs, 'Creative Obfuscation: The Role of Joint Development Agreements in Side-Stepping Sovereignty Disputes', in *Proceedings of the Australian and New Zealand Society of International Law Annual Conference 2000*, Centre for International and Public Law, Australian National University, Canberra, 2000, 167.

84 Cablegram from DEA to Australian Mission to the UN, 9/11/49, in NAA A1838, Item 929/4/6 Pt 1.

freedom to member governments while insisting on their real responsibilities as parties to the convention.'[85] If majority support was not forthcoming for this style of clause, the delegation was directed to withhold support from any clause that implied a lack of competence in a federal state to implement external commitments or implied that such power was limited to subject areas covered by other express heads of power.[86] As an indication of the sensitivity of the issue, the delegation was told to exercise 'utmost caution in public argument' and to endeavour to arrive at a satisfactory formula by private discussion.[87]

Examining the process that led to the adoption of this stance reveals the absence of any push from Commonwealth departments or states as to the inclusion of a federal-State clause. At a Commonwealth inter-departmental meeting held in September 1949, Terence Glasheen of the Department of External Affairs explained the imperative to avoid any implication that the 'power of the Commonwealth was not comprehensive enough to cover the ratification of international conventions'.[88] There is no record of any Commonwealth department demurring.[89] Instead, the meeting resolved that the memorandum on the options (including have no federal-State clause) should be the subject of further discussion and policy decision by the Attorney-General's Department and the Department of External Affairs.[90] Similarly, when a copy of the UDHR and the draft Covenant was forwarded to states in 1949, only one state commented on the federal implications of the Covenant. Tasmania stated:

> In the case of a Federated Government based on sovereign States retaining certain controls such as Australia, every endeavour should be made to speed up the lines of communication and decisions as between the major contact body and the sovereign States by recognizing the existing machinery and making the responsible State Department officially a Federal and State liaison advisory body.[91]

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85 *Ibid.*
86 *Ibid.*
87 *Ibid.*
88 Minutes of Inter-departmental committee, held 12-13 September 1949, in NAA A 1838/278, Item 856/13/7 Pt 5.
89 *Ibid.*
90 *Ibid.*
91 Comments annexed to Letter from Premier of Tasmania to Prime Minister Menzies, 2/2/50, in NAA A 1838/278, Item 856/13/7 Pt 5.

Even in drawing attention to this issue, though, Tasmania was not suggesting that human rights should become the exclusive purview of the states. Instead, human rights were seen to be most properly the subject of co-operative development.

Instead, the dominant factor in Australia's cool response to a federal-State clause appears to have been an awareness of Evatt's desire to maintain the possibility of the Commonwealth legislating in the area. Whilst the High Court might obstruct the Commonwealth's efforts, Evatt's concern was not to give the High Court ammunition for invalidating any such legislation. It was important to preserve the Commonwealth's capacity to implement human rights through the enactment of legislation. This consideration disappeared during the later periods of policy development.

II. Spender Period

After Spender became Minister for External Affairs, Australia's policy shifted dramatically. The diffidence of the Evatt period evaporated. It was replaced by an aggressive defence of the necessity of a federal-State clause. Thus in September 1950 Colin Moodie, Australia's representative in the Third Committee of the General Assembly, sought to defend the legitimacy of federal-State clauses by referring to their use some thirty years previously in International Labour Organisation instruments.[92] Central governments, Moodie argued, could not assume responsibilities that were not within their competence without 'endangering the basic compromise of federation and, ultimately, the federation itself'.[93] A static view of Australia's constitutional division of powers was advanced. Capital punishment, judicial process, retroactive legislation and punishment, liberty of movement, freedom of speech and thought, freedom of association and assembly were all matters that were within state competence alone. The wish of the Australian people was that states should retain and exercise these powers.[94] Were the central government to accept and ratify the Covenant unilaterally, it would be

92 C Moodie, Australian representative, UN Doc A/C.3/SR 292, 134; 25 October 1950.
93 *Ibid.*
94 *Ibid.*

provocative to state feeling and 'a breach of the whole spirit of the federation. The constituent states must be consulted and must indicate their views'.[95] Including a federal-State clause would enable central governments to accede to the Covenant immediately, avoiding the delays involved in gaining the agreement of all constituent states.[96]

Moodie's statement mirrored the pessimism concerning the Commonwealth's power to implement legislatively international human rights standards expressed in internal documents in 1950. The conclusion of a joint memorandum prepared by the Attorney-General's Department and the Department of External Affairs in 1950 was that the Court 'as at present constituted' might give a restrictive interpretation of the federal government's power to legislate to implement conventions concerning subjects that were not expressly included in its field of legislative powers.[97] This view was said to be based on the post-war trend of High Court constitutional decisions and by the human rights Covenant itself. In terms that harked back to a notion of 'reserved state powers',[98] the memorandum argued that were the external affairs power broad enough to authorise Commonwealth legislation implementing all the human rights guarantees, states' power would be reduced to insignificance:

> A moment's consideration of this covenant will reduce 'ad absurdum' the arguments of those who favour the extreme interpretation of the external affairs power, as giving the Commonwealth authority to legislate to implement any international treaty to which it is a party. On this view the federal government, by ratifying the Covenant could invade the state field in such fundamental matters as capital punishment, and judicial process, the hearing of criminal charges, retroactive legislation and punishment, liberty of movement, freedom of speech and thought, freedom of association and assembly. Moreover, if the Covenant includes economic and social (including health) rights, the government, by ratifying the Covenant, would secure powers which have been expressly denied to it by referenda. An extension of the area of international agreement would enable the federal government under s 109 of the Constitution to ratify the States into legislative impotence.[99]

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95 *Ibid.*

96 C Moodie, Australian representative, UN Doc A/C.3/SR 308, 233; 8 November 1950.

97 Memorandum entitled 'Federal State Clause in International Agreements', undated, but related to memorandum dated 15/5/50, in NAA A 1838/1, 929/4/6 Pt 1.

98 According to the 'reserved state powers', the Commonwealth Constitution impliedly 'reserved' states' legislative powers. Grants of power to the commonwealth were to be read narrowly so as to avoid infringements of these reserved powers: see eg *R v Barger* (1908) 6 CLR 41. The High Court rejected the existence of any such implication in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

99 Memorandum entitled 'Federal State Clause in International Agreements', undated, but related to memorandum dated 15/5/50, in NAA A 1838/1, Item 929/4/6 Pt 1.

The High Court was anticipated as being likely to concur with the view of Professor Harrison Moore that 'a matter in itself, purely domestic, and therefore within the exclusive powers of the States cannot be drawn within the range of Federal power merely because some arrangement has been made for uniform national action'.[100] The approach it advocated was for Australia, Canada and the United States to put forward a joint proposal modelled on the clause in the International Labour Organisation Constitution that referred to the separation of powers under States' constitutional systems.[101] If necessary, the delegation could yield to pressure of non-federal States by supporting an obligation to report on the application of the federal-State clause, though such support was to be kept in reserve as a tactical concession rather than a starting point for negotiations.[102]

The High Court's composition had not radically altered between 1947 and 1950. Nor had there been any High Court decisions on the external affairs power in this period. The most likely reason for the reversal in position appears to be the change in legal personnel providing the advice. By 1950, Kenneth Bailey (then Solicitor-General) was playing a greater role in providing advice as to the likely attitude of the High Court. A submission to the Minister of External Affairs in November 1951 reported that the Attorney-General's Department (presumably Bailey) had come to the view that the inclusion of a federal state clause was *essential* if Australia were ever to contemplate becoming a party to the Covenant.[103] In his public statements, Bailey was certainly cautious about the extent of the Commonwealth's external affairs power, describing the position as remaining 'obscure'.[104] In his 1951 article on the Australian Constitution, he displayed his personal preference for a wide reading of section 51 (xxix) in order for the federal division not to:

> prove one of crippling weakness, leaving Australia to face a shrinking world in which concerted and decisive international action is necessary for her welfare, but without the authority to ensure the fulfilment of her undertakings.[105]

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100 *Ibid.*
101 *Ibid.*
102 *Ibid.*
103 Submission to Minister for External Affairs, 14/11/51, in NAA A 1838/1, Item 856/13/22.
104 KH Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 314, 322.
105 *Ibid.*

At the same time, however, in the context of the human rights Covenants, Bailey stated that '[f]or practical reasons, it may be much more convenient to leave the whole matter to be handled by the legislatures of the States'.[106]

It is evident that concern for the position of the Australian states and maintaining federalism was given emphasis by Commonwealth decision makers rather than being prompted by a groundswell of concern by states. In the responses of states received in 1950 to the draft Covenant, no state made any comment about the issue of powers. Bearing in mind that the draft Covenant in 1950 had a federal-State clause, the states had the opportunity to comment on its terms. The absence of any comments is significant for ruling out state pressure as the dominant motivating force behind the Australian representative's strong comments about the 'spirit of the federation'.

The initiative for limiting Commonwealth power to implement human rights standards came from within the Commonwealth. This finding is consistent with the highly particularised form of federalism supported by the Menzies government. Political commentators like Campbell Sharman have questioned the Menzies government's commitment to federalism, pointing out that Menzies showed no inclination to roll back the Commonwealth's financial powers[107] and spoke less about federalism than other topics such as freedom.[108] Yet, rather than eschewing federalism, Menzies and the Liberal Party supported a narrowly conceived form of federalism, borne out of the desire to protect freedoms. Their concern was not so much to empower states or preserve state authority as to prevent the growth of centralised power. Centralised power was associated with Labor's socialist goals.[109] In uniting the anti-Labor parties into the Liberal Party, Robert Menzies had proclaimed the importance of avoiding

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106 Quoted in a note by J Clarke, Attorney-General's Department, 'Human Rights Covenant: Federal Clause', 29/1/54 in NAA A 432/20, 54/3779 Pt 9.

107 In 1942, the Commonwealth had instituted the uniform tax scheme that excluded the states from the collection of income taxation. The states became dependent on grants from the Commonwealth: see C Sharman, 'Federalism and Commonwealth-State Relations' in S Prasser, JR Nethercote, J Warhurst, *The Menzies Era: A Reappraisal of Government, Politics and Policy*, Hale and Iremonger, Sydney, 1995, 139.

108 *Ibid.*

109 I Hancock, *National and Permanent: The Federal Organisation of the Liberal Party of Australia 1944-1965*, Melbourne University Press, Melbourne, 2000, 62.

excessive government intervention and the 'dull and deadening process' of socialism.[110] The 1946 Draft Platform of the Liberal Party thus listed federalism under its constitutional policies.[111] The notion of federalism was attractive precisely because it could act as a bulwark against an all powerful, interventionist, central government. In this defensive mindset, Liberal Ministers could emphasise the responsibility of the Commonwealth to avoid usurping state functions without necessarily seeking to encourage states to exercise their legislative powers. An absence of governmental regulation of a subject area would be preferable to an over-extension of central governmental power.

In the context of human rights matters, this particularised commitment to federalism may well have fostered the view amongst policy-makers that the federal government should not accept international responsibilities to take legislative action in novel areas. It would also militate against attempts by Commonwealth policy-makers to direct the states to take legislative action, particularly to extend the scope of government regulation in individual's lives. Instead, perceptions of the Liberal Party's commitment to federalism could encourage support for clauses leaving the implementation of human rights primarily to the states, the policy underpinning Australian support for a broad federal-State clause.

III. Casey and Bureaucratic Period

From 1951 until 1965, Australia's enthusiasm for a federal-State clause was unabated. In its official comments to the United Nations Secretary-General in 1951, for instance, Australia noted its regret that there had been insufficient time for discussion of a federal-State article at the Fifth session of the Commission on Human Rights, and concluded that '[s]o far as Australia is concerned, the inclusion of a Federal clause

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110 This phrase was used by Robert Menzies at the Canberra Conference of 1944: quoted in PC Spender, *Liberalism: Some Reflections on the Past, Some Thoughts on the Future*, James Ferguson, Brisbane, 1970, 8.

111 C Sharman, *op cit*, 139.

seems essential'.[112] Whitlam engaged in private discussions with the United States, the United Kingdom and India on the form of clause.[113] In April 1952, the Australian delegation to the United Nations queried the Department of External Affairs as to whether Australia needed to maintain its support for the clause.[114] The Department of External Affairs replied in the affirmative.[115] In addition to reminding the delegation of the uncertainties surrounding the 'external affairs' power, the Department of External Affairs noted that the bulk of the laws covering relevant subject matters were state rather than Commonwealth in nature. To create an entirely new body of federal law for the sole purpose of implementing the Covenant was described as 'politically and administratively impossible'.[116] In this statement, the Department of External Affairs revealed that the basis of the policy was not only legal principle, but Australia's view of what was most practicable – that is, state responsibility for human rights.

As a result of discussions between Australia, India and the United States, a new joint text was proposed at the Eighth Session of the Commission on Human Rights in 1952. It permitted a federal State to be exempted from itself carrying out provisions that were 'wholly or in part within the jurisdiction of the constituent units'.[117] In relation to such provisions, the central authority was merely obliged to bring the provisions to the attention of constituent units with a favourable recommendation, ask for information on the laws of constituent units concerning those provisions and transmit such information to the Secretary-General of the United Nations.[118] Unlike the previous draft that Australia had supported, under this clause the Commonwealth forewent any possibility of legislating with respect to human rights matters using the external affairs power. The

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112 Cablegram from DEA to Australian Consulate General, Geneva, 3/8/51, in NAA A 1838/342, Item 929/4/4 Pt 2.

113 Report of the Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1,Item 856/13/10/7 Pt 2A.

114 Referred to in Cablegram from DEA to Australian Mission to the UN, NY, 18/4/52, in NAA A 1838, Item 929/4/6 Pt 1.

115 *Ibid.*

116 Quoted in Memorandum of J Clarke, Attorney-General's Department, 29/1/54, in NAA A 432/20, Item 54/3779 Pt 9.

117 UN Doc E/CN.4/L 199, extracted in MJ Bossuyt, *op cit*, 764.

118 *Ibid.*

draft provided that a federal authority would not gain any legislative competence by virtue of entering the treaty.

Despite the Department of External Affair's stance that Australia would not be able to contemplate adherence to the Covenants in the absence of a federal-State clause,[119] Whitlam at one stage was moving towards the position of supporting a reservations clause rather than a federal-State clause. After meeting with Dr Kaechenbeeck[120] in May 1953, for instance, Whitlam wrote a letter to Kenneth Bailey stating his agreement with Kaechenbeeck's opinion that a federal-State clause was likely to prove too rigid to adapt to changes in constitutional law brought about by future judicial pronouncements. A reservation was also seen as having the advantage of preserving the mutuality of obligations since a State could not invoke particular clauses against another State if it had entered a reservation to that article. Whitlam concluded:

> Candidly my own view accords very closely, if not wholly with K. Strength of opinion, particularly in the smaller states behind the traditional principle of equality of obligations and reciprocity between parties to treaties, is extreme and the necessity for some consideration of a compromise is clearly indicated.[121]

Kenneth Bailey, remained unmoved. He stated in a Cablegram:

> While it is true that...a Federal Clause deviates from the principle of international law that no State can plead at international law that its Constitution precludes it from fulfilling its international obligations, it is equally true that a Federal State cannot, in British countries at any rate, plead in its municipal courts that an international obligation releases it from constitutional limitations. The only escape, therefore, for a Federal State which is subject to relevant constitutional limitations is to refrain from entering into international obligations which are not qualified by a Federal States clause. [122]

1954 was the watershed year in terms of international attitudes towards the position of federal States. As mentioned in the 'overview' section above, the Commission on Human Rights in 1954 adopted what might be termed an 'anti-federal-State clause'. It mandated that the Covenant was to extend to all parts of federal States without any limitations or exceptions. The Australian response was predictable. John Hood, as

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119 Memorandum to A/g Secretary, DEA concerning 'Human Rights Commission – Ninth Session', 1/4/53, in NAA A 1838/1, Item 856/13/10/8/1.

120 Dr Kaechenbeeck, in addition to being an international legal expert, acted as a representative of Belguim.

121 Letter from HFE Whitlam to KH Bailey, 4/5/1953, in NAA A 1838/2, Item 856/13/10/8 Pt 1.

122 Cablegram from DEA to Australian Consulate General, 7/5/53, in NAA A 1838/2, Item 856/13/10/8 Pt 1.

Australian delegate, argued that the Soviet proposed clause was inconsistent with the General Assembly's initial Resolution to seek ways of maximising the application of the Covenant to federal States.[123] The text was discriminatory in that it did not take into account the particular constitutional problems of federal states.[124] In a refrain that was to be repeated from 1954 until 1965, Hood stated that Australia would be unable to adhere to the draft covenants in the absence of a satisfactory federal-State clause.[125]

The debate over a federal state clause in 1954 not only centred around the issue of equity and universality (as in previous sessions), but extended to the legitimacy of federal-State clauses under principles of classical international law. Whitlam conceded in the Third Committee that a federal clause might not be in line with a 'strict interpretation' of classical international law, but that to rule out the clause on that basis would be to ignore the emerging pattern of international organization that had been the greatest achievement of the twentieth century.[126] Australia had only recently reached a fully independent status in international law, '[I]ts Constitution, which had been born out of struggle, meant a great deal to its people and could not lightly be disregarded or interfered with.'[127] Each constituent unit of the Federation was 'jealous of their time-honoured rights'. The traditional doctrines of classical international law did not contemplate divisible sovereignty and were in themselves of doubtful application to any State so constituted.[128] In asking the Commission on Human Rights to settle a modern problem on a point of classical doctrine of international law, the Soviet Union's request would be 'to frustrate the organic growth of international law and to prevent it from rendering effective service to a rapidly changing society'.[129] Whitlam discounted arguments that the United Nations Charter already obliged States to apply the human rights agreed to by a majority of States in their States, regardless of constitutional

123 JDL Hood, Australian representative, UN Doc A/C.3/SR 564, 104; 27 October 1954.
124 *Ibid.*
125 JDL Hood, Australian representative, UN Doc A/C.3/SR 582; 12 November 1954; See also RN Hamilton, Australian representative, A/C.3/SR 748, 335; 31 January 1957; T Pyman, Australian representative, A/C.3/SR 782,102; 16 October 1957.
126 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 438,4; 17 March 1954.
127 *Ibid*, 5.
128 *Ibid*, 5.
129 *Ibid*, 7.

structure. The United Nations remained an association of sovereign States and not a supra-State and as such could not impose obligations upon its Members without their consent. [130]

Publicly, Whitlam rejected the option of entering a reservation to particular clauses. It was said to be improper for Australia to commit to the conventions and then withdraw the commitment by making reservations of certain matters.[131] Such action was wrong in principle and might strain the relations between the federal and local governments which would also undermine the proper observance of the covenants. [132] Furthermore, Whitlam attempted to assuage those concerned with the extent of obligations that would be taken on by Australia, noting that legal obligations were not always the most important element of the commitments in international agreements:

> The ultimate obligation was a moral and spiritual one. Consequently, the limited sxope [sic] of the legal obligations undertaken by federal States was not the full measure of their real commitments.[133]

Australia grew increasingly isolated in its stance in the years after 1954. The United States withdrew co-sponsorship of the clause in 1954, after it announced that it would not be ratifying either international instrument.[134] Despite this, Australia pushed for the insertion of a federal-State clause, amending its proposals in an attempt to win broader support. Thus the section included in Australian's 1955 Note Verbale added a paragraph to rebut the perceived inequity of permitting federal States to be exempted from obligations:

> A contracting State shall not be entitled to avail himself of the present Covenant against other contracting States except to the extent that it is bound by the Covenant.[135]

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130 HFE Whitlam, Australian representative, UN Doc E/C.4/SR 440, 8-9; 18 March 1954.

131 *Ibid.*

132 *Ibid*, 9.

133 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 438, 7; 17 March 1954.

134 In 1953, the United States announced that it would not be ratifying the Covenants. Its announcement was catalysed by domestic discontent about the Executive's aggregation of power through entering treaties. An amendment to the Constitution was mooted (the Bricker amendment) that would have had the effect of denying domestic effect to any treaty that would not have been constitutional as a simple act of Congress: see M Glen Johnson, 'The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights' (1987) 9 *Human Rights Quarterly* 19, 45.

135 Australian Comments on Draft Covenant on Economic, Social and Cultural Rights, July 1955; Australian Comments on Draft Covenant on Civil and Political Rights, July 1955; in NAA A 432/68, Item 68/2797 Pt 3; UN Doc A/2910/Add 2.

This proposal was no more successful than its predecessors in winning the support of the Third Committee of the General Assembly.

It is interesting to note that in the Casey and Bureaucratic period, Commonwealth departments and states that had previously expressed little interest in the federal-State clause began agitating for the inclusion of such a clause. In 1951, for instance, the Department of Labour and National Service was suggesting a graduated ratification approach be adopted. According to this approach, a federal State should ratify in relation to subject areas within its competence. Other subject matters should only be the subject of ratification if agreed upon by a majority of the population in each state.[136] The Department of External Affairs responded that such a proposal was unlikely to be accepted by the international community.[137]

By 1955, individual Australian states, too were being vocal in their support for the clause. Tasmania in 1955, for instance, wrote to the Prime Minister stating that that the Soviet style federal clause was 'entirely unacceptable' and should be replaced by that previously proposed by Australia. For Tasmania, it was not simply a matter of politics, but legality. It also opined that '[as] the Commonwealth cannot in any event bind the States as to matters within their legislative powers' the anti-federal State clause would be 'legally inoperative'.[138] Victoria decried the anti-federal State clauses on the basis that they 'might purport to alter the fundamental relationship between the federal and the constituent bodies...by purporting to bring within the legislative competence of the federal body, matters which under the Constitution are reserved to the constituent bodies'.[139] The Solicitor General of Victoria, HA Winneke, issued a warning to the Victorian Premier that if the external affairs power permitted the Commonwealth to legislate with respect to the Covenants, 'the Commonwealth Constitution could be

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136 Minutes of inter-departmental committee held 20/7/51, in NAA A 1838/342, Item 929/4/4 Pt 2.
137 *Ibid.*
138 Letter from Premier, Hobart, to Prime Minister Menzies, 22/4/55, in NAA 462/21, Item 575/1.
139 Letter from Premier Cain, Victoria, to Prime Minister Menzies, 13/5/55, in NAA A 462/21, Item 575/1.

indirectly amended in this matter...without resort to referendum'. [140] Western Australia appeared less concerned as the opinion of their Crown Solicitor was that the Covenants 'related to essential domestic matters' such that accession would not have any effect of conferring powers on the Commonwealth.[141]

Only in 1966 did Australia give up its advocacy of a federal-State clause. It was an act motivated by pragmatism rather than principle. In 1965, Paul Hasluck as Acting Minister for External Affairs approved a shift of policy in relation to the Convention on the Elimination of all Forms of Racial Discrimination. No federal-State clause was included in the CERD, yet Australia signed the Covenant.[142] In the face of this precedent and the perceived certainty that a federal-State clause would not be accepted by a majority of delegates, Australian representatives were advised not to press for inclusion of a federal-State clause.[143] When a final roll call was taken on the anti-federal-State clause embodied in Article 27 of the ICESCR and Article 50 of the ICCPR, Australia abstained.[144] RF Osborn, as Australian representative, reiterated the difficulties that would be created for federal States in applying all the provisions of the Covenant 'without limitation or exception' and indicated that the clause would inevitably delay Australia's ratification.[145] Australia was admitting defeat, but was not surrendering its objections.

Looking at Australian policies towards the issue of a federal-State clause as a whole, it is apparent that behind the movement from initial indifference to intransigent insistence were distinct conceptions about the role of the Commonwealth in implementing human

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140 Opinion of HA Winneke, Solicitor General, attached to Letter from Premier Cain, Victoria to Prime Minister Menzies, 13/5/55, in NAA A 462/21, Item 575/1.

141 Report of Crown Law Authorities of Perth, annexed to letter from Under Secretary, Premier's Department, to Sir John Bunting, Secretary, Prime Minister's Department, 1/11/65, in NAA A 463/50, Item 65/4844.

142 Memorandum from AH Body, Acting Legal Adviser to the DEA, to the Deputy Secretary, Attorney-General's Department, 30/9/66, in NAA A 432/68, Item 68/2797 Pt 3.

143 This stance was outlined in memorandum of AH Body, Acting Legal Adviser to the DEA, to the Deputy Secretary, Attorney-General's Department, 30/9/66, in NAA A 432/20, Item 68/2797 Pt 3

144 RG Osborn, Australian representative, A/C.3/SR 1411, 195; 2 November 1966.

145 *Ibid*; See also UN Press Release, GA/SHC/1249, 2/11/66, copy in NAA A 1838/1, 929/4 Pt 22; Full copy of statement in Memorandum from RG Osborn for Delegation, Australian Mission to the UN, NY to the A/g Secretary, DEA, 4/11/66, in NAA A 1838/1, Item 929/4 Pt 21.

rights. Evatt desired the Commonwealth to take an active role in enacting human rights legislation of general application and was concerned to maximise the chances of the High Court accepting the validity of such legislation. During the Spender, Casey and Bureaucratic periods, a more pessimistic view of the High Court's likely attitude combined with the view that state rather than Commonwealth implementation was more practical and desirable, to produce a strong attachment to the inclusion of a federal-State clause. Even in 2001, at a time when the High Court has made it clear that the Commonwealth would have legislative competence over international human rights obligations,[146] this Part highlights the likelihood that Australian governmental actors will possess divergent attitudes as to the best means of implementing human rights guarantees.

C. Reservations

One of the broader questions that was grappled with by drafters of the ICCPR and ICESCR was whether to allow States to make reservations[147] and, if so, whether any restrictions should be placed on this power. It was an issue of obvious relevance to the scope of domestic obligations that would be undertaken by a State. If a State made a reservation in relation to a particular topic, purporting to exempt the State or a State policy from the operation of a substantive human rights clause and that reservation was permissible under the Covenant, then it would not be bound to implement domestically that clause. Australia's participation in the somewhat sporadic debates on the topic of reservations was marked by increasing support for a State to have an unfettered capacity to enter reservations.

Overview of the International Debate

Discussion of the topic of reservations in the negotiations on the Covenants took place against a background of general uncertainty concerning the scope of States' powers to

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146 The expansive approach of the High Court to the external affairs was most recently confirmed in *Victoria v the Commonwealth* (1996) 138 ALR 129.

147 Reservations are statements made by a State at the time of ratifying or acceding to a treaty, by which they purport to make exceptions to the commitments they undertake under that treaty.

enter reservations to treaties at international law. [148] The customary international law position that developed around the time of the League of Nations was that a reserving State's ratification of a treaty was only effective if *all* other State Parties to the convention accepted the reservations.[149] The rule of course could be altered by specific agreement of the parties within the terms of the treaty.[150] Within the Organisation of American States, a varied practice grew up. Reserving States' ratification would be in general effective, save only that it would not be effective as between the reserving State and any individual State who objected to the reservations.[151] Both tests were primarily 'subjective' in nature – that is, whether or not reservations were appropriate was a question judged by other States according to no fixed criteria. Consent, rather than any objective test, determined the appropriateness of a reservation. The International Court of Justice in the *Reservations* case[152] developed a new approach to the issue.

At issue in the *Reservations* case was the validity of reservations to the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948* ('the Genocide Convention').[153] The case had been referred to the Court by the General Assembly after debate about the legitimacy of reservations to the Genocide Convention were raised there. In 1951, the International Court of Justice handed down its judgement. In a split 7:5 decision, the Court concluded that if a State had made a reservation to the Genocide Convention, the State could be considered a party to the Convention provided the reservation was compatible with the object and purposes of the Convention. Although establishing an essentially objective test for the legitimacy of reservations, the Court

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148 As to contemporary literature on the question of reservations, see AD McNair, *The Law of Treaties* Clarendon Press, Oxford, 1961; GG Fitzmaurice, 'Reservations to Multilateral Treaties' (1953) *2 International and Comparative Law Quarterly* 1.

149 DP O'Connell, *International Law*, vol 1, Stevens and Sons, London, 1965, 251.

150 The League of Nations, in a Resolution in 1931, for instance, declared that reservations to multilateral treaties could only be made at the moment of ratification and would be effective only if all other signatory States agree on the lodgement of such reservations of if such reservations had been provided for in the text of the Convention: League of Nations Official Journal, Special Supplement, No 92, October 1931, 10: quoted by DP O'Connell, *op cit*, 251.

151 J Linehan, 'The Law of Treaties', in S Blay, R Piotrowicz, M Tsamenyi, *Public International Law: An Australian Perspective*, Oxford University Press, Melbourne, 1997, 102.

152 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Rep 1951, 15.

153 Convention on the Prevention and Punishment of the Crime of Genocide, 1948, opened for signature 9 December 1948, entered into force generally 12 January 1951, ATS 1951 No 2.

also held that if a particular State took the view that the reservations did not meet this compatibility test, that State could treat the party as not a party to the Convention. The majority emphasised that no one State could be permitted to frustrate the *raison d'etre* of the convention by lodging reservations. Thus more than an individualised subjective approach was required. The minority rejected the applicability of the 'compatibility' test, re-affirming the traditional view that the consent of all States was required before a reservation (or the ratification of the reserving State) would be effective.[154]

Whilst establishing a new test to be applied, the *Reservations* case did not bring an end to debate over the topic of reservations. The Court had not had to consider the legitimacy of specific reservations, such that the application of the compatibility approach remained untested. Commentators varied in their opinions as to whether the compatibility test could be usefully applied to all treaties.[155] It was not until 1969 that the international community agreed upon a basic test for reservations within the context of the *Vienna Convention on the Law of Treaties.*[156] What the *Reservations* case did, however, was to sensitise the international community to the thorny issues surrounding reservations. The General Assembly adopted a series of Resolutions on the topic, directing United Nations depositaries to accept lodgment of reservations without judging the reservations and recommending that specific provisions on the acceptability of reservations be included in multilateral conventions to provide clarity.[157]

As Vratislav Pechota has noted, there were no drafting proposals to include an Article allowing reservations in the earliest deliberations upon the draft Covenant on Human Rights.[158] In the aftermath of the *Reservations* case, the General Assembly adopted a

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154 The case is discussed more fully in I Brownlie, Principles of Public International Law, 4th Ed, Clarendon Press, Oxford, 1990, 609-610; J Linehan, *op cit*, 102.

155 The International Law Commission for instance initially rejected the 'compatibility' test as being too subjective. It was not until 1962 that it endorsed the test: I Brownlie, *op cit*, 610.

156 Vienna Convention on the Law of Treaties, Articles 21-22.

157 See I Brownlie, *op cit*, 609, J Linehan, *op cit*, 102.

158 For a brief summary consideration given to the reservations issue in the drafting of the ICCPR, see V Pechota, 'The Development of the Covenant on Civil and Political Rights', in L Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 52-54.

specific Resolution on the Human Rights Covenant, recommending that the Commission on Human Rights include a clause dealing with the 'admissibility or non-admissibility' of reservations.[159] It was not until 1954 that specific drafting proposals were put forward to permit or restrict reservations. The issue of reservations was discussed sporadically in the period 1954-1966, yet at no stage did any of the proposed clauses permitting reservations garner sufficient support to be included in the draft Covenants. Thus the ICCPR and ICESCR were finalised without any clause on reservations. Given the timing of the international debates, most of the Australian policy consideration given to the topic was confined to the Casey and Bureaucratic period. Unfortunately, only brief comments can be made about Australia's early attitude towards the issue of reservations.

I. Evatt Period

In the Evatt period, Australia placed comparatively little importance on the making of reservations. In response to its awareness of potential inconsistencies between Australian law and human rights guarantees, the Australian Mission to the United Nations advised the Department of External Affairs to examine the extent of change to Australian law needed.[160] The Australian Mission reported the views of the United Kingdom and the United States that accession with reservations should not be allowed. The Australian delegation did not in private or public make any comment on the issue.[161] Instead, it seems to have viewed the debate over reservations as significant more in terms of reflecting ideological divisions. Thus the Australian Mission reported that the United Kingdom and United States wished to ensure that only States accepting full obligations would be able to participate in the debate concerning international implementation.[162] Though not explicitly stated, the message seemed to be that the United Kingdom and the United States considered that the Soviet Union was likely to make reservations and should be prevented from having a say in shaping the

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159 GA Resolution 546 (VI), 5 February 1952, 6 UN GAOR Resolutions Supp No 20, 37 (1952).
160 Cablegram from Australian Delegation, UN Assembly, NY to DEA, 11/5/48, in NAA A 1838/278, Item 856/13 Pt 3.
161 *Ibid.*
162 *Ibid.*

international means of implementation. In any case, there was little sense of the issue of reservations being of vital significance for Australia.

II. Spender Period

There is even less evidence of the attitude of policy-makers in the Spender period towards the topic of reservations. There were no submissions on the topic, nor were there any public comments on point. Instead, the focus appears to have been on ensuring that the shape of the substantive clauses was consistent with Australian desires. An emphasis on the necessity of a reservations clause did not emerge until the Casey and Bureaucratic period.

III. Casey and Bureaucratic Period

In the early 1950s, after the appointment of Richard Casey as Minister for External Affairs, Australia had a rather contradictory approach to the issue of reservations. On the one hand, the Brief for the Eighth Session for the Commission on Human Rights in 1952 stated that reservations should not be permitted.[163] On the other hand, the same Brief was also contemplating Australia making a reservation in respect of the inhabitants of trust territories should a colonial-application clause not be accepted by the Commission.[164] It was as if reservations were to be permitted only in the rarest circumstances. This reluctance to permit reservations was jettisoned however by 1954.

In 1954 the United Kingdom put forward a draft reservations clause that was fully supported by Australia.[165] The proposal permitted States to enter reservations of any type and such reservations were to take effect provided they were supported by two-thirds of the States which became parties to the Covenant within a fixed period. It implicitly rejected the approach of the International Court of Justice in the *Reservations*

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163 Brief for the Australian Delegation to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/7 Pt 1.

164 *Ibid.*

165 Memorandum from Australian Mission to the UN, NY to the Secretary, DEA, 29/5/50, in NAA A 518/1, Item 104/5/1 Pt 1.

case in favour of a return to a more consent-based test. Such a proposal was promoted as a means of affording adequate safeguards against the use of reservations to avoid obligations under the Covenants whilst taking due account of some States' good faith inability to accede to all provisions of the Convention.[166] In the same session, Chile and Uruguay were arguing that no reservations should be permitted.[167] The Soviet Union advocated that States should have an unfettered power to make reservations. [168]

The Australian delegation, headed by Fred Whitlam, described the United Kingdom's proposal as a 'realistic and accommodating approach' that encouraged ratification whilst ensuring reservations were not of so wide a character as to invalidate the Covenants.[169] In expressing support for the United Kingdom proposal, Whitlam criticised the International Court of Justice's 'compatibility' test as an inappropriate fetter on States' rights.[170] Furthermore, it was said that the criteria used for the compatibility test, that is whether the reservation was compatible with the object and purpose of the Convention, was not readily applicable to such multifaceted documents as the human rights Covenants. Unlike the Genocide Convention that dealt with only one international crime, the human rights Covenants concerned a wide variety of subjects and thus applied 'to nearly every aspect of the life of contemporary society'.[171] Even with respect to the Genocide Convention, four of the five dissenting members of the International Court of Justice had expressed dissatisfaction with the difficulties in ascertaining whether or not a reservation passed the compatibility test.[172]

Whitlam also keenly defended the right of States to make reservations per se. Reservations were a necessary concession to the 'collectivity of the States which might become parties to the Covenants'.[173] One could not set out a hierarchy of reservations

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166 JDL Hood, Australian representative, UN Doc A/C.3/SR 564,104; 27 October 1954.
167 *Ibid.*
168 *Ibid.*
169 Memorandum from Australian Mission to the UN, NY, to the Secretary, DEA, 30/3/54, in NAA 432/20, Item 54/3779 Pt 9.
170 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 444, 3-4; 23 March 1954.
171 *Ibid.*
172 Memorandum from Australian Mission to the UN, NY, to the Secretary, DEA, 30/3/54, in NAA 432/20, Item 54/3779 Pt 9.
173 HFE Whitlam, UN Doc E/CN.4/SR 446,8; 24 March 1954.

where some were acceptable and others not. The United Kingdom approach had the benefit of being tailored to suit the community of treaty-making States who were bound by 'common interests and corporate feelings of fellowship'.[174] States would mark their recognition of the interdependence of the contemporary international community and of the fact that peace and security could be achieved only by determined efforts to promote the economic and social advancement of all peoples in accordance with the United Nations Charter[175] by permitting States to make reservations.

In the years 1955 to 1965, the inclusion of a reservations clause became an established part of Australian policy. Though the leadership role in promoting the clause was left largely to the United Kingdom, Australian Briefs directed Australian delegates to support the United Kingdom's initiative.[176] They also included references to Australia's need for specific reservations for example, to deal with the Australian policies towards indigenous people[177] or Australia's opposition to the right of self-determination.[178]

By 1965, the United Kingdom modified its position in the hope of winning majority support for the inclusion of a reservations clause. Its revised proposal incorporated a compatibility test for reservations.[179] This placed Australian policy-makers in a quandary. The Department of External Affairs, concerned that some of the reservations that Australia might conceivably wish to make might not pass such a test, ordered the delegation to abstain from voting on the clause unless by so doing, Australia would be isolated.[180] In 1966, Australian representatives spoke in favour of the United Kingdom proposal. It was defended as being necessary to solve the constitutional problems faced by States or to permit States to set up special machinery for implementation of

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174 *Ibid.*

175 *Ibid.*

176 See for example, Brief for the Australian Delegation to the 10th Session of the General Assembly, in NAA 1838/1, Item 856/10/10/9 Pt 3.

177 *Ibid.*

178 Cablegram of DEA to Australian Mission to the UN, NY, 14/11/55, in NAA A 432/72, Item 64/3090.

179 Cablegram from DEA to Australian Mission to the UN, NY, 20/12/65, in NAA A 1838/1, Item 929/5/6 Pt 4.

180 *Ibid.*

rights.[181] The shift in policy seems to have been motivated by an awareness that Australia ultimately accepted a similarly worded clause in CERD on the basis of the prevailing international climate,[182] and that an unqualified right to make reservations was unlikely to be endorsed by the General Assembly.

When no reservations clause was included in either the ICCPR or the ICESCR, Australian policy-makers were not overly concerned. While admitting the existence of some uncertainty, the Australian Mission to the United Nations expressed the view that States would be able to make reservations to the Covenants. In its view, the general rules of international law would permit the making of reservations, though it noted that several States had considered the 'compatibility' test a necessary pre-requisite.[183] The stage was thus set for Australia to limit its obligations through the lodgement of reservations to both Covenants. Furthermore, the absence of any principled commitment to the application of a compatibility test made unlikely that such reservations would be subject to a rigorous examination domestically as to their 'compatibility' with the Covenants.

During the Casey and Bureaucratic periods, one thus sees a significant switch in Australian policy: from opposing to supporting a reservations clause. This change appears to have been motivated by concerns about Australian 'vital interests'. By 1954, Australia was concerned that other means of limiting obligations, such as a federal-State clause and a colonial application clause, would not be included. Support for a reservations clause was thus a fallback position. Whitlam's State-centric view of international law clearly influenced the form of arguments used. The legacy was, however, a deep-seated belief in the right of States to determine the extent of their international law obligations.

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181 RF Osborn, Australian representative, UN Doc A/C.3/SR 1142, 203; 3 November 1966.

182 Cablegram from DEA to Australian Mission to the UN, NY, 29/11/65, in NAA A 1838/1, 929/5/6 Pt 4.

183 Cablegram from Australian Mission to the UN, NY to DEA, 7/11/66, in NAA A 1838, Item 929/4 Pt 21.

Conclusion

This Chapter has presented an account of Australian policy dominated by movements away from extensive Commonwealth action to implement human rights. These movements belie any inevitability in Australian support for the application of all human rights guarantees throughout the territory of Australia. In the area of the domestic obligations clause, Australia began by promoting expansive State domestic responsibilities and ended by resisting attempts to impose any obligations to legislate to protect human rights. In parallel developments, Australia showed increased enthusiasm to limit the federal government's responsibilities to implement human rights through the insertion of a federal-State clause and an intensified commitment to an unqualified reservations clause in the periods of Liberal administration.

Neither the federal system nor constitutional complexities offer sufficient explanations for these shifts in attitude. Instead, this Chapter highlights the likely interplay of the personal and party-political philosophies of the key personnel involved in policy-development. While Evatt was committed primarily to preserving Commonwealth legislative action to implement human rights, Spender and his Liberal Party successors had an aversion to such centralised exercises of power. The 1950s also saw a resurgence of the influence of Diceyan notions of reliance of the common law and parliamentary sovereignty as the means of protecting human rights amongst key Commonwealth lawyers like Whitlam and Bailey. As a result, Australian policies moved from an active conception of the State respecting, promoting, protecting and ensuring human rights, to a more passive vision of the State respecting human rights. Such a vision encouraged the 'reading-down' of obligations clauses and the keen defence of non-interventionist means of protecting rights. It was not a vision, therefore, likely to give rise to an expansive programme of State remedial action in furtherance of its international obligations.

Chapter 6

The International Implementation of Human Rights

Introduction

This Chapter considers Australia's approach to the international implementation of human rights. By international implementation is meant the ways in which the international community was to be involved in monitoring and responding to alleged human rights violations committed by State Parties to the human rights Covenants. Notwithstanding the Soviet Union's consistent stance that all forms of international implementation represented an interference with State sovereignty,[1] the majority of delegations favoured some form of international implementation. The questions then multiplied – what form of system? An adjudicatory system or conciliatory system? Should individuals have a right to petition bodies or should only States have that right? Should the system of implementation be identical for all forms of rights?

If one subscribed to the 'Cold War' perspective on human rights development (discussed in the Introduction), one might have expected that in contradistinction to the Soviet stance of implacable opposition, Australia would have offered its consistent support to a system of international implementation of human rights. Co-incidentally, such an assumption would also sit well with the 'continuous support' approach to Australia's human rights policy development identified in the Introduction. The narrative that emerges from this Chapter is more complex. Australia entered the debates on international implementation as a strong advocate for international, judicial modes of dispute resolution. With the intensification of world tensions, however, came a wariness concerning the ability of any United Nations body to provide an impartial

[1] As to the Soviet hostility to all forms of international implementation, see J Humphrey, *Human Rights and the United Nations: a great adventure*, Transnational Publishers, New York, 1984, 54 and F Jhabvala, 'The Soviet Bloc's View of the Implementations of Human Rights Accords' (1985) 7 *Human Rights Quarterly* 466. It is also noted in the Report of the Australian Delegate to the Fifth Session of the Commission on Human Rights, in NAA A 432/85, Item 47/725 Pt 3.

consideration of human rights matters and a suspicion of the motives of any individual who would complain of human rights abuses to the international community. Weakening support for strong international implementation mechanisms also significantly masked a shift from an individual-centred view of the implementation of human rights guarantees to a State-centred desire to protect the reputation and stability of the State.

Overview of the International Debate

Given that the UDHR was conceived as a non-binding statement, the real debate as to international implementation occurred in relation to the draft ICCPR and ICESCR. The measures of international implementation were the subject of discussion in the early years of the Commission on Human Rights (1947-1952) and the later years of the Third Committee's investigation (1963-6). Even before a final decision was taken on whether to draft one or two Covenants,[2] separate implementation schemes were being discussed for civil and political rights and economic, social and cultural rights. When finalised, both Covenants imposed an obligation on States to provide periodic reports on the implementation of human rights. The ICCPR, however, included a further implementation mechanism – the establishment of a Human Rights Committee to conciliate inter-State complaints and provide views on communications from individuals in circumstances where States had ratified the Optional Protocol to the ICCPR.[3]

In respect of civil and political rights, a range of implementation options were canvassed before the international community opted for the Human Rights Committee complaint-based system.[4] Various papers on implementation were authored by the

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2 The separation of the draft Covenant on Human Rights into two separate Covenants is discussed at length in Chapter 1.

3 Optional Protocol to the International Covenant on Civil and Political Rights, open for signature 19 December 1966, entered into force generally 23 March 1976, ATS 1991 No 39.

4 For an excellent account of the Human Rights Committee, see D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford, 1991, Chapter 1.

Secretariat of the United Nations and the Working Group on Implementation of the Commission on Human Rights.[5] The alternatives considered included an International Court of Human Rights,[6] a High Commissioner for Human Rights[7] and ad-hoc Committees of Inquiry.[8] In 1950, the Commission on Human Rights voted in favour of the establishment of a permanent body based on the French model for a Commission of Inquiry and Conciliation. The body was to hear only complaints between States and to offer its 'good offices' to the States concerned with the aim of facilitating a friendly solution to the dispute. The body was to be composed of persons elected by State members of the Commission.[9] It was the model ultimately adopted for the ICCPR.[10]

The issue of whether individuals should have the right to petition the Human Rights Committee was raised periodically throughout the negotiations. In 1949, when a motion proposing such a right was put to the vote, the members of the Commission were evenly divided. Despite later discussion in the Commission on Human Rights,[11] and the Third Committee of the General Assembly,[12] the decision was never reversed. Instead, in the late 1960s, majority support coalesced around a United States compromise proposal for a separate protocol to be drawn up giving individuals a right of petition.[13] As result of the right of petition being contained within a separate

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5 See for instance, Report of the Drafting Committee, 1947, UN Doc E/CN.4/21, Annex H; and Secretariat documents: UN Doc E/1371, 9 UN ESCOR, Supp (No 10), 1949, Annex III; UN Doc E/4511, accompanying UN Doc A/5655, 18 GAOR, Annexes, Agenda Item 48 (1963).

6 Australia was the leading proponent of a Court of Human Rights as is discussed later in this Chapter. See for instance, UN Doc E/1371, 9 ESCOR Supp 10 (1949).

7 The establishment of this office was encouraged in particular by Uruguay and the United States, see J Humphrey, *op cit*, 130; D McGoldrick, *op cit*, 13.

8 The United Kingdom in particular supported the establishment of ad hoc fact finding committees as discussed later in this Chapter.

9 The 1950 decision of the Commission on Human Rights is discussed by D McGoldrick, *op cit*, 6

10 The details of the inter-State complaint mechanism were largely settled by 1950 and adopted by the General Assembly in 1966. The details of the Commission's manner of appointment and establishment were subject to greater debate and were not resolved until 1953-4. For a detailed history of the drafting of Part IV of the ICCPR, see MJ Bossuyt, *Guide to the 'Travaux Preparatoires' of the International Covenant on Civil and Political Rights*, Martinus Nijhoff, Dordrecht, 1987, 501-787.

11 In 1951, for instance, the Commission rejected the suggestion for non-government organisation petitioning 7:4:3, and individual petitioning 8:3:3: MCR Craven, *The International Covenant on Economic, Social and Cultural Rights*, Clarendon Press, Oxford, 1995, 18.

12 In 1950, the General Assembly considered the question of petitions and directed the Commission on Human Rights to proceed with consideration of provisions to be inserted into the draft Covenant or in separate protocols, dealing with the receipt and examination of petitions from individuals and organisations: GA Resolution 421F (1950), quoted in D McGoldrick, *op cit*, 7.

13 See D McGoldrick, *op cit*, 14.

protocol, States could adhere to the human rights Covenants without necessarily permitting their citizens to approach the Human Rights Committee. The Optional Protocol to the ICCPR was thus drafted and finalised at the same time as the ICCPR.

Granting the Committee powers to independently look into human rights practices of individual countries was considered but rejected by a majority of delegates of the Commission on Human Rights. In 1950, when the Commission voted in favour of the French-style inquiry and conciliation body, it rejected a proposal that the Committee should have a general power to supervise 'observance of the provisions' of the human rights Covenant.[14] In 1955, India proposed that the Committee be able to initiate inquiries of its own accord into human rights violations.[15] It met with no greater success. Instead, the view that the Committee essentially was to respond to actions by States was adopted. Throughout the 1950s, the idea of States' reporting on the protection of civil and political rights within their jurisdictions was on the table.[16] In 1966, the Third Committee voted for this proposal.[17] States would be obliged to submit periodic reports to the Human Rights Committee.[18] The Human Rights Committee would consider such reports, and was empowered to make 'general comments' on their contents.[19]

There was significantly less debate concerning the implementation of economic, social and cultural rights. At its Seventh Session in1951, the Commission on Human Rights drafted provisions on implementation that provided for State Parties to submit periodic reports to the Economic and Social Council. Such reports were to cover the progress made in achieving the observance of economic, social and cultural rights. To prevent duplication of effort, States were permitted to refer to reports that had been submitted to

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14 *Ibid*, 6.

15 As to the Indian proposal, see UN Doc A/2929, in 10 GAOR, Annexes, Agenda Item 28, Part II (1955), quoted by D McGoldrick, *op cit*, 13.

16 As to the details of the proposals, see MJ Bossuyt, op cit, 620-621.

17 *Ibid*, 623. In most particulars, the clause adopted (Article 40(1) of the ICCPR) was identical to that proposed by the Commission on Human Rights. The major amendment deleted reference to the qualifying term 'legislative and other' measures taken by State parties.

18 Article 40(1) ICCPR.

19 Article 40(4) ICCPR.

other specialised bodies.[20] Major debate centred around the appropriate role for the specialised agencies rather than whether reporting was an appropriate implementation mechanism. In the draft submitted by the Commission on Human Rights to the General Assembly in 1954, it was resolved that the Economic and Social Council would act as a conduit to such specialised bodies.[21] The Third Committee resolved not to consider the issue of implementation until having settled the substantive contents of the Covenants.[22] Thus it was not until the 1965-6 period that attention was focused on the implementation of economic and social rights.

The basic shape of the ICESCR international implementation was approved without major change by the Third Committee of the General Assembly. In 1966, the United States and Italy advanced an amendment providing for the establishment of an expert Committee to review the State reports.[23] The proposal was based on that contained within the Convention on the Elimination of all Forms of Racial Discrimination (CERD).[24] Yet, this proposal failed to gain the support of the Third Committee since a majority feared that such a body might encroach upon the work of the Economic and Social Council and the functions of the specialised United Nations agencies. The proposal was thus withdrawn though there was recognition that the Economic and Social Council might establish such a body in the future.[25] The original reporting mechanism was maintained with States to report on the 'measures which they have adopted and the progress made in achieving the observance of the rights'.[26] It was also envisaged that States would indicate factors and difficulties affecting the degree of fulfilment of obligations under the ICESCR.[27]

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20 D McGoldrick, *op cit*, 7.
21 UN Doc A/2808, quoted in MCR Craven, *op cit*, 20.
22 MCR Craven, *op cit*, 20.
23 UN Doc A/C.3/SR 1401, 9-10; 24 October 1966.
24 MCR Craven, *op cit*, 21.
25 See MCR Craven, *op cit*, 22. The current ICESCR Committee of Experts was established in 1985.
26 Article 16(1) ICESCR.
27 Article 17(2) ICESCR.

I. Evatt Period

Supporters and detractors of Dr HV Evatt alike accept that he had a passionate commitment to the United Nations and a belief in creating a strong international system to maintain peace.[28] As a result, it comes as no surprise that at his behest Australia pushed for strong mechanisms of international implementation, mechanisms that were to be accessible to both individuals and States. Significantly, in consistently arguing for such modes of international implementation, Australia was not deterred by a lack of support from traditional allies such as the United States and the United Kingdom. Nor was it convinced that strong models of international implementation would in any way interfere with the 'domestic jurisdiction' of States.

During the Evatt period, international implementation was seen as the key issue for the international negotiations of the International Bill of Rights. When Australia was invited to be a member of the first Commission on Human Rights, Evatt's enthusiasm for participation was linked specifically to his desire to see strong methods of international implementation developed. Thus in directing Colonel Hodgson personally to attend the Commission on Human Rights proceedings, Evatt specifically mentioned the need to continue pushing for a Court of Human Rights.[29] The Court was the only institution mentioned explicitly in the Cablegram. When three sub-groups were established by the Commission in 1947, one with responsibility for drafting the Declaration, one for drafting the Covenant and a third on implementation, Australia opted for membership of the Working Group on Implementation. Its enthusiasm for implementation even led Australia to initially voice objection to the drafting of a non-binding Declaration,[30] though in time it was to welcome the UDHR as a necessary

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28 See eg N Harper and D Sissons, *Australia and the United Nations*, Manhattan Publishing Company, New York, 1959, 276-280. Evatt labelled 'steady and unwavering support for the United Nations, especially the purposes and principles declared in the Charter' to be the first and fundamental principle of Australia's foreign policy: See Notes of Speech on Foreign Affairs, House of Representatives, 9 February 1949, 'Speeches and Statements, 1948-9(a)' Folder, Evatt Collection, Flinders University; See too Evatt's speech in 1948: Commonwealth of Australia, House of Representatives, *Parliamentary Debates, (Hansard),* vol 196, 8 April 1948, 748-50.

29 Cablegram from DEA to Hodgson, 23/1/47, in NAA A 1838/1, Item 856/13 Pt 1.

30 Report of Australian Representative on Drafting Committee, International Bill of Human Rights, First Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/2/1.

precursor, a first step towards a binding Covenant.[31] In its speech on the occasion of the UDHR's adoption by the General Assembly, Australia noted its anticipation of the further development of modes of international implementation for the rights.[32]

In keeping with this enthusiasm, Australia advanced bold and expansive international implementation proposals. The centrepiece of Evatt's policy was the proposal for an International Court of Human Rights. The Commission on Human Rights was not the first forum in which Evatt had put forward such a proposal. At the Paris Peace Conference in 1946, a conference concerned with the negotiation of peace treaties between the allies and European ex-enemy States,[33] Australia pushed for the establishment of a European Court of Human Rights.[34] Drawing upon such international precedents as the Permanent Court of International Justice, and the Arbitral Tribunal of Upper Silesia,[35] Australia suggested that if provisions were to be inserted in the peace treaties dealing with human rights, there needed to be also an international mechanism for the enforcement of such rights. From the papers included in the Brief for Australian delegates to the Paris Peace Conference, the proposal appears to have been particularly influenced by the writings of Professors Bentwich and Kaeckenbeeck.[36] Norman Bentwich had advanced the thesis that the time was ripe for a

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31 Cablegram from Delegation to Commission on Human Rights to DEA, 11/12/48, in NAA A 1838/1, 856/13 Pt 5.

32 Speech of Australian delegate to General Assembly on Declaration of Human Rights, in NAA A 1838/1; 856/13/7 Pt 2; also available as Speaker's Notes on the Report of the Commission on Human Rights, undated but circa December 1948, 'UN Charter' Folder, Evatt Collection, Flinders University.

33 The Paris Peace Conference of 1946 negotiated the peace treaties between the Allies and Roumania, Bulgaria, Hungary, Finland, Austria and Germany. It also drafted a treaty between the Allies and Italy. Documents relating to the Paris Peace Conference are found in NAA A 1067/1, Item E/46/38/28, and NAA A 10563/; For general commentary on the Paris Peace Conference, see CWP Waters 'Voices in the Wilderness: HV Evatt and the European Peace Settlement', in D Day (ed), *Brave New World: Dr H V Evatt and Australian Foreign Policy: 1941-49*, University of Queensland Press, Brisbane, 1996; S Kertesz, *The Last European Peace Conference: Paris 1946 – Conflict of Values*, University Press of America, Lanham, 1985.

34 Statement Concerning the formation of a European Court of Human Rights included in NAA A 1838/1, Item 856/13 Pt 1.

35 The Arbitral Tribunal of Upper Silesia was set up after World War One to deal with claims between German and Polish citizens regarding their treatment following the re-drawing of boundaries between the two territories: see CA Macartney, League of Nations' Protection of Minority Rights, in E Luard (ed), *The International Protection of Human Rights*, Camelot Press, London, 1967, Chapter 2.

36 Extracts from these two authors are to be found in the Briefs for Australian delegations: see for instance, Statement for Australian Delegate on Court of Human Rights, Political and Territorial Commission for Italy, in NAA A 1067/1, Item E/46/38/28.

Court of Human Rights[37] in an article in the 1944 British Yearbook of International Law. Kaeckenbeeck, reflecting on the operations of the Silesian Arbitral Tribunal, had concluded that central to the prospects of success of an international body with jurisdiction over nationality claims was the need for individual-initiated complaints and the power of an authority to make binding determinations.[38]

In defending the European Court proposal, Evatt and other Australian delegates rejected the utility of political remedies to deal with human rights abuses. Evatt, for instance, derided the effect of State declarations alone:

> The history of the territorial adjustments made at the Conference of Versailles suggests that basic and essential rights and freedoms of the individual - who is so often the cipher in territorial adjustments - should not hinge simply upon declarations made by states. Such declarations, standing alone, are not sufficient to guarantee the inalienable rights of the individuals and behind them it is essential that some sufficient sanction be established.[39]

Negotiations between parties (particularly State parties) was also viewed as providing second-class justice. States might compromise an individual's interests in circumstances where a Court would make an order for redress.[40] Quoting CA Macartney, negotiations were seen as 'tempering injustice with mercy, but...not meting out justice'.[41] Diplomatic redress was insufficient since human rights were 'not things to be created or extinguished, to be granted or withheld, to be enlarged or restricted, according to the politics of governments and the workings of diplomatic processes.'[42] National governments alone could not be trusted to protect human rights since individuals would be subject to the arbitrary will of a majority.[43] A court, on the other

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37 N Bentwich, 'Statelessness through the Peace Treaties After the First World War' (1944) *British Year Book of International Law* 171, 176.

38 Dr Kaeckenbeeck's reflections on the Arbitral Tribunal for Upper Silesia from his text, *The International Experiment of Upper Silesia: a study in the workings of the Upper Silesian Settlement, 1922-1937*, Oxford University Press, London, 1942, are quoted in the Statement for Australian Delegate on Court of Human Rights, Political and Territorial Commission for Italy, in NAA A 1067/1, E/46/38/28.

39 Statement by Delegate for Australia in Paris Peace Conference, undated, in NAA A 1838/278, 856/13 Pt 1.

40 *Ibid.*

41 *Ibid.* The Delegate was quoting from CA Macartney, *National States and National Minorities*, Oxford University Press, London, 1934, 11-12.

42 *Ibid.*

43 European Court of Human Rights: Statement by Delegate for Australia, undated, in NAA A 1838/278, Item 856/13 Pt 1.

hand, would not only serve to give individuals remedies, but would serve as a deterrent to would-be perpetrators of abuse.[44]

The proposal was given little consideration at the Paris Peace Conference. The Legal and Drafting Committee of the Conference concluded that the state of international law was in flux. The topic of human rights was to be the subject of further discussion by the Economic and Social Council. In such circumstances, it was not possible to compel a State to accept the decision of an international legal body on contested matters of human rights.[45] Australia withdrew its proposal at this point. In the negotiations of the Italian peace treaty, the Australian delegate raised the proposal again, but to similar avail.[46] Although Australian delegates expressed some frustration that their proposal had not been given proper consideration in the 'blind stabbing' rush to compromise with the Soviet Union to gain a peace treaty,[47] the delegation was not unduly discouraged. In accepting the decision of the Conference, the Australian delegate, for instance, ventured the hope that in the future ex-enemy States and the successor States would voluntarily enter into a joint covenant for the setting up of a Court of Human Rights.[48] Likewise in their internal correspondence, a conviction was expressed that Australia had gained respect for its stance and that in time to come Australia's case would be vindicated.[49] Indeed the delegation appears to have gone to the Paris Peace

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44 Statement by Dr Herbert V Evatt, First Delegate of the Australian delegation, Australian Amendments and Proposed Additions to Draft Treaties, 21 August 1946, 'War-Paris Peace Conference, 1945-6' Folder, Evatt Collection, Flinders University.

45 Doc C.P. (JR) 4th Meeting, 11 September 1946, RG 31, International Conference, Paris Peace Conference 1946, Box 2; United Nations Archives, New York. Note that in a later document prepared by the UN Secretariat, the failure of the Court proposal was attributed to delegations' view that the Security Council offered a sufficient forum for the resolution of human rights issues: Memorandum on Implementation, in NAA A 432/85, Item 47/725 Pt 3.

46 In the context of discussions of the Italian peace treaty, the proposal was defeated 15:4 with one abstention: Report of Australian delegation to Paris Peace Conference, undated, in NAA A 2910, Item 412/25/25.

47 Letter from JA Beasley to Evatt, 14/2/47, 'War – Paris Peace Conference 1945-6' Folder, Evatt Collection, Flinders University. Evatt himself expressed resentment at the attitude of the Council of Foreign Ministers (UK, USSR, USA, France and China) who were unwilling to consider changes to the text they had previously agreed to: Cablegram from Evatt to JA Beasley and R Hodgson, 11/1/47, 'Cables - London- 1943-1946' Folder, Evatt Collection, Flinders University.

48 European Court of Human Rights: Statement by Delegate for Australia, undated, in NAA A 1838/278, 856/13 Pt 1.

49 Letter from JA Beasley to Evatt, 'War-Paris Peace Conference 1945-6' Folder, Evatt Collection, Flinders University.

Conference with peculiarly low expectations, considering that even though the proposal may well not be adopted, Australia's proposal would assist in the campaign for a European Court of Human Rights that would in turn be the precursor of a 'World Bill and Court of Fundamental Rights'.[50]

When the Commission of Human Rights began its deliberations, the Australians were quick to grasp the opportunity to resurrect the Court of Human Rights proposal. Obeying his orders from Evatt, Colonel Hodgson raised the issue of the Court at the first meeting of the Commission.[51] Whenever the opportunity arose, Australians spoke with great fervour about the establishment of a Court. One Australian delegate for instance proclaimed:

> The Australian proposals for an International Court of Human Rights have been put forward because we favour a continuous, effective, and just system of international supervision. In English law the remedy is to us as important as the right, for without the remedy there is no right. *Our basic thesis is that individuals and associations as well as states must have access to and full legal standing before some kind of international tribunal charged with the supervision and enforcement of the covenant. In our view either a full and effective observance of human rights is sought, or it is not. If we do seek it, then the consequence must be admitted and the idea of compulsory judicial decisions accepted.*[52] (emphasis added)

In a manner reminiscent of the statements at the Paris Peace Conference, Australian delegates emphasised that only a court judgement would be likely to lead to changes in State actions. Were practices of States subject merely to discussion in the General Assembly, any General Assembly Resolution that was forthcoming from the debate might be easily dismissed as having been tainted by political considerations.[53] A court judgment would be impartial and would be regarded as having greater legitimacy than any alternative. It was recognised that establishment of the Court would not be without difficulties, but considered that it would be possible. If the Nuremberg Tribunal had been created in a situation where the relevant laws were not clearly established, the

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50 'International Court of Civic Rights and International Nationality Tribunal', paper in Briefing for Australian delegation to Paris Peace Conference, undated, in NAA A 1067/1, Item E 46/38/28.

51 Cablegram from R Hodgson to Evatt, 8/2/47, in NAA A 1838/1, Item 856/13 Pt 1; See too: Report on First Session of Commission on Human Rights; in NAA A 1838/1, Item 856/13 Pt 1: 'It was left to Australia to point out that no International Bill of Rights would have any effect unless there was provision for enforcement'.

52 Statement by Australian Representative on International Court of Human Rights, undated, in NAA A 432/82, Item 1947/725 Pt 3. See to similar effect statement of Alan Watt in the Third Committee of the General Assembly: UN Doc A/C.3/SR 92, 56; 2 October 1948.

53 Statement by Australian Representative on International Court of Human Rights, undated, in NAA A 432/82, Item 1947/725 Pt 3.

situation would be easier in the case of a Court of Human Rights which would be responsible only for enforcing fixed norms, set out in the Bill (of human rights).[54]

In 1948, a detailed statute for the International Court was prepared, clarifying the parameters of the Court's anticipated powers.[55] The statute made provision for a wide range of categories of parties to have standing before the Court: States (including in certain situations, States who were not parties to the international covenants), individuals, groups of individuals, and associations, whether national or international. The Court could also receive information from public international organisations and request information from such organisations. It was also empowered to request the Commission on Human Rights to carry out particular investigations.

The Court was to have jurisdiction over:

> (i) All disputes arising out of the interpretation and application of the Covenant on Human Rights referred to it by any party to such Covenant;
> (ii) All disputes arising out of the interpretation and application of Articles concerning human rights in any treaty or convention between States referred to it by any party to such treaty or convention;
> (iii) All matters concerning the observance of Human Rights by the parties to such Covenant or to any such treaty of Convention referred to it by the Commission on Human Rights[56]

This jurisdiction clause was startling in its breadth. It included not only disputes arising from the Covenants being drafted but also human rights disputes arising under any other treaty if one party referred the case, or matters relating to either category of treaty referred by the Commission on Human Rights (a form of non-voluntary jurisdiction). Although the delegation was later to query whether the intention was to give the Court such extensive powers, the reply from the Department indicated that this intention was deliberate.[57] As a result of pressure within the Commission on Human Rights, a

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54 *Ibid.*

55 The draft Statute can be found in NAA A 1838/1, Item 856/13/7 Pt 1; It was also included in the Report of the Working Group on Implementation's Report to the Commission on Human Rights: UN Doc E/CN.4/53, Annex C.

56 *Ibid.*

57 The Australian delegation queried the source of the Commission's power in dealing with disputes under other treaties and asked whether in such cases, the consent of both parties would be required: Cablegram from delegation to DEA, 13/5/48, in NAA A 1838/278, Item 856/13 Pt 3. The Department responded that it was not intended that both parties in a particular dispute would have to consent, given that States would be agreeing in advance to the jurisdiction of the Court through becoming parties to the court's statute. Furthermore, the Commission's powers could be expanded

filtering role for the Commission on Human Rights in relation to the complaints of individuals and associations was introduced. In addition to jurisdiction over contested cases, the Court was to have the capacity to give advisory opinions on questions relating to human rights at the request of the Commission on Human Rights. The Court itself was to be the ultimate arbiter of its own jurisdiction.

In Australia's original draft, the Court was to have both original and appellate jurisdiction. Individuals or States could approach the Court in the original instance to pass judgment on their claim or they could appeal from State court judgments to the International Court. This feature was identical to that proposed in the Paris Peace Conference by Evatt.[58] Significant disquiet was evident in the Department concerning the difficulties raised by each type of authority. In an internal memorandum to Alan Watt which was discussed with Evatt, the point was made that there could be significant embarrassment of national courts should there be a necessity to exhaust domestic avenues before approaching the Court. However, were the Court to act in the first instance, there was the spectre of 'irresponsible organizations bringing suits against their respective governments'.[59] Evatt did not respond directly to this concern, requesting only that someone with legal training report on developments from New York.[60] In the end, the issue of appellate authority became a casualty of discussion in the Commission on Human Rights.

The draft statute presented to the Commission on Human Rights had comparatively little detail about remedies. Like the statute for the International Court of Justice,[61] the draft statute stated that decisions of the Court would bind only the parties and the

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by agreement: Cablegram from DEA to Australian Delegation, UN, 17/5/48, in NAA A 1838/278, Item 856/13 Pt 3.

58 Statement concerning the formation of a European Court of Human Rights, in NAA A 1838/1, Item 856/13 Pt 1.

59 Memorandum to A Watt, (author unclear), circa 1947, in NAA A 1838/278, Item 856/13/2.

60 Annotations on memorandum to A Watt, (author unclear), circa 1947, in NAA A 1838/278, Item 856/13/2.

61 Statute for the International Court of Justice, opened for signature 26 June 1945, entered into force generally 24 October 1945, ATS 1975 No 50.

judgement was without appeal.[62] Powers of the Court to award damages or reparations were not mentioned. The lack of any details concerning remedies might have been considered an oversight had it not been for the fact that, at the Paris Peace Conference, Australia had put forward proposals enforcement of judgments. In that context, Australia had suggested that the Court make orders for damages and that such orders would be enforceable against the revenues or other property of the State.[63] By the time of the Commission on Human Rights, this feature was omitted, leaving the Working Group on Implementation a free hand to devise a new system.

The Working Group on Implementation recommended that the successful party (or the Commission on Human Rights) be given the capacity to raise the matter with the General Assembly. The General Assembly would then make a recommendation as to appropriate action.[64] Australia did not express any particular concern at this model, a response that seems somewhat surprising in so far as the Working Group's model did not provide for guaranteed redress for individuals who had suffered human rights violations. It may have been that Australian delegations remained confident that States who respected the rule of law would abide by Court judgments without future coercive mechanisms being required. Certainly, at the Paris Peace Conference, Australia had downplayed the issue of enforcement of judgements, stating '[t]he problem to be solved is not the enforcing of a judgement (which is one of the ultimate problems of International Law), but the implementing of clauses.'[65]

At no point did the draft statute for the Court purport to define the boundaries of the term 'human rights'. Given Australia's consistent support for economic and social rights during the Evatt period,[66] it might have been assumed that the Court was designed to have jurisdiction over breaches of all rights recognised by the international

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62 Statute for the Court of Human Rights, in NAA A 1838/1, Item 856/13/7 Pt 1.

63 Statute for a European Court of Human Rights, contained in NAA A 1067/1, Item E 46/36/8.

64 Report of Fifth Session of the Commission on Human Rights, Report to ECOSOC, Annex III, 36-7. (1949); E/1371, 9 ESCOR Supp 10.

65 Paper entitled 'International Court of Civic Rights and International Nationality Tribunal', included in brief to Paris Peace Conference, in NAA A 1067/1, Item E 46/38/8.

66 See Chapter 1.

community. This was not necessarily the view of Evatt's bureaucratic officers. In explaining the Commission on Human Rights' drafting of a questionnaire on methods of implementation for human rights in 1949, the Australian delegate took credit for suggesting a separate question on the implementation of economic rights. It was said that this separation was justified on the basis of the view expressed 'by Australian representatives and others' that judicial machinery might be less suitable than the involvement of specialised agencies for the investigation of economic and social rights.[67] There is no evidence that Ministerial support was sought prior to this decision. One possibility is that this selective view represented the independent view of the Department. However, the fact that in some of the documents for the Paris Peace Conference, the European Court was labelled a 'Court of Civic Rights' would tend to support the hypothesis that Evatt shared the Department's vision of a Court limited to hearing complaints of civil and political rights.[68]

In advancing the Court proposal, delegates were convinced of the appropriateness of international action to enforce human rights. When questioned as to how the imposition of a non-voluntary Court solution could be reconciled with the over-arching 'sovereignty' of States, delegates emphasised that States were already under obligations to abide by human rights under the United Nations Charter:

> If we believe in the idea of international bills of human rights we must necessarily accept these limitations [on sovereignty]... In the Charter we have already accepted the principles governing our actions in these fields, and there should be no objection to a system which seeks to keep us up to our obligations.[69]

At the Paris Peace Conference Australian delegates had been savage in their derision of the 'sovereignty' objection. Sovereignty was said to be:

> an outmoded conception, a fetishist survival whose worship should be anathema in the fact of economic and human inter-relationships of our one atomic world.... Gentlemen, every international agreement is a derogation of sovereignty.[70]

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67 Noted in Report of the Australian representative to the Fifth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/7 Pt 4.

68 Note for instance, the preparation of a paper entitled 'International Court of Civic Rights and International Nationality Tribunal', included in brief to Paris Peace Conference, in NAA A 1067/1, Item E 46/38/8.

69 Statement by Australian Representative on International Court of Human Rights, undated, in NAA A 432/82, 1947/725 Pt 3.

70 Quoted in internal memorandum to Watt concerning the Court of Human Rights, (author unclear), undated, in NAA A 1838/278, Item 856/13/2. This position seems to have been somewhat at variance with the official briefing for the Paris Peace Conference which included an extensive note

In the Commission on Human Rights, Australian delegates were more moderate in their statements. Sovereignty of States was accepted as a valid concept. It was not regarded, however, as a barrier to State acceptance of human rights obligations and the establishment of an international court.

As John Humphrey, the Director of the UN Division of Human Rights from 1946 to 1966, has pointed out, the Australian proposal for a Court does not appear such a radical suggestion when considered in the light of the European Community's establishment of such a body in 1950.[71] Yet, despite receiving the endorsement of the Working Group on Implementation,[72] the proposal never came close to enjoying the support of a majority of the Commission.[73] Within the Working Group on Implementation, only Belgium actively supported the proposal.[74] The Soviet Union was implacably opposed to the proposal which it perceived as a breach of sovereignty.[75] The United Kingdom regarded the proposal as premature in light of the fact that the content of the Bill had not yet been determined.[76] The United States pointed to the chilling effect the Court

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from Professor Bentwich stressing that human rights were a matter of international concern, such that no infringement of sovereignty was involved with respect to the establishment of a court: Annex D to Papers from the Peace Conference, contained in memorandum from Australian External Affairs Office, London to the Secretary, DEA, dated 7/11/46, in NAA A 1067/1, Item E/46/38/28.

71 Allan Watt cited the European community's movement towards a court hopefully in the Third Committee in 1948: UN Doc A/C.3/SR 92, 56; 2 October 1948.

72 Report of Working Group on Implementation, Annex C to Commission on Human Rights, 2nd Session Report to the Economic and Social Council, 36-54. Included in the Report is a summary of the debate on the Australian proposal. The Report of the Working Group was subsequently adopted by the Commission on Human Rights. Colonel Hodgson considered the acceptance of the Report in the Plenary Session to be a 'signal victory for Australian proposal for Court of Human Rights'. He reported that the proposal was 'widely commended and even Governments previously in opposition namely United States and United Kingdom agreed scheme merited consideration by their Governments and voted for its transmission': Cablegram from R Hodgson to DEA, 16/12/47, in NAA A 1838/1, Item 856/13/2.

73 Harper and Sissons report that Australia faced almost continuous opposition from the great powers: N Harper and D Sissons, *op cit*, 252.

74 Memorandum from the Secretary, Attorney-General's Department, to the Secretary, DEA, 14/4/49, in NAA A 1838/1, Item 856/13/7 Pt 2. In initial reports Hodgson was more hopeful - reporting to Watt that when first raised, support was received from India, Uruguay and to some extent France and Belgium. Chile and Iran was also reported to be sympathetic: Cablegram from R Hodgson to Evatt, 8/2/47, in NAA A 1838/278, Item 856/13 Pt 1.

75 Hodgson, for instance, in his report on the Second Session of the Commission on Human Rights reported that the USSR objected to the Australian proposal 'on the well known theme that it would impinge upon the sovereignty and independence of States.'. A copy of the report is to be found in NAA A 1838/278, Item 856/13 Pt 2.

76 See Cablegram from R Hodgson to Evatt, 8/2/47, in NAA A 1838/1, Item 856/13 Pt 1.

might have upon ratifications given the prevailing world climate.[77] Chile described the scheme as 'utopian'.[78] While France offered some support, it regarded the moment for such a Court as 'not yet ripe'[79] preferring a Commission of Inquiry and Conciliation. Even the international jurist, Professor Lauterpacht, a strong proponent of developing the international human rights system, rejected the Australian proposal on the bases that it would be controversial given outstanding concerns about the scope of domestic jurisdiction and State sovereignty, that it would encourage litigation and that it would be ineffective in being able to evaluate domestic law systems.[80]

As early as December 1947 Australian delegates were pointing to the need for Australia to consider its responses to other mechanisms given the lack of support for its Court.[81] By April 1949 the Department of External Affairs concluded that the Court proposal was destined for rejection despite evidence of growing support by non-governmental organisations.[82] Interestingly, in the departmental memorandum presenting the strength of opinion against the Court, there is some suggestion that not even Australia would ratify a Covenant that included a Court 'at the present time'.[83] Australia, too, was beginning to question the effect that the Cold War would have on the impartial dispensation of justice. The Department recommended to Evatt that the delegation shift its stance to supporting the Court as an adjunct to the French commission proposal, fearing that if the Court remained an independent proposal, it might be defeated permanently.[84] Evatt's direction, however was to continue pushing for a Court 'for

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77 United States Delegation Handbook No 1, UN Commission on Human Rights, 3rd Session, 1948, Box 4581, Eleanor Roosevelt Papers, Franklin D Roosevelt Library, Hyde Park.

78 Report of Australian Representative on the Drafting Committee of the International Bill of Rights, 1947, in NAA A 1838/1, Item 856/13/2/1.

79 *Ibid.* As to the French proposal, see UN Doc E/CN.4/82/Add.10/Rev 1, and UN Doc E/CN.4/147; described in memorandum from the Australian Mission to the UN to the Secretary, DEA, 16/2/49, in NAA A 1838/1, Item 856/13/7 Pt 2.

80 H Lauterpacht, *An International Bill of The Rights of Man*, Columbia University Press, New York, 1946; quoted and discussed in memorandum from the Australian Mission to the UN to the Secretary, DEA, 16/2/49, in NAA A 1838/1, Item 856/13/7 Pt 2.

81 Cablegram from DEA to R Hodgson, 5/12/47, in NAA A 1838/278, Item 856/13/2.

82 Memorandum from TG Glasheen, for the Secretary, DEA to the Secretary, Attorney-General's Department, 14/4/49, in NAA A 1838/1, Item 856/13/7 Pt 2.

83 Letter from TG Glasheen, on behalf of the Secretary, DEA to the Secretary, Attorney-General's Department, 14/4/49, in NAA A 432/82, Item 47/725 Pt 3.

84 Submission to Minister Evatt, 17/6/49, repeating advice from delegation, in NAA A 1838/1, Item 856/13/7 Pt 4.

tactical reasons' while working towards the establishment of the French style conciliation and inquiry commission.[85]

At a departmental level there appears to have been some willingness to qualify the Court proposal in an attempt to make it more attractive to other States. In particular, in late 1949 a draft response was prepared by the Department of External Affairs to the Commission on Human Rights' questionnaire on implementation. In addition to making clear the exclusion of economic and social rights from the jurisdiction of the Court, the response suggested that the Court would only be expected to act in response to 'cumulative experience of indifference, laxity or ill-will' rather than in response to isolated or individual breaches.[86] In addition, a (French-style) Commission was envisaged as the primary enforcement agency, with the Court only being utilised as a last resort against systematic breaches of human rights.[87] Such conservatism was no doubt welcomed by the Department of Labour and National Service which voiced opposition to the Court proposal on the basis that 'supervision should not be pressed to a point where legal sanction is outstripping moral acceptance' of the provisions of the Covenant.'[88]

Notwithstanding the departmental preparedness to qualify Australia's Court proposal, Australia's consistent support internationally for the Court is significant. In choosing the model of a court for the adjudication of human rights disputes, Australia was indicating a preference for judicial modes of dispute resolution, at least in relation to civil and political rights. It was also revealing a commitment to permitting individuals to petition the Court and a concern about ensuring not only that States were prevented

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85 Evatt's directions were repeated in the memorandum from the A/g Secretary, DEA, to Australian Mission to the UN, 28/4/49, in NAA A 1838/1, Item 856/13/7 Pt 3. Similarly, in the draft answer to the Secretary-General's Questionnaire on Implementation prepared before the change of government, the development of a two stage process incorporating a Commission and a Court represented a significant shift in Australia's stance on the working of the Court: in NAA A 1838/278, Item 856/13/7 Pt 5.

86 Draft answer to the Secretary-General's Questionnaire on Implementation, in NAA A 1838/278, Item 856/13/7 Pt 5.

87 *Ibid.*

88 Letter of W Funnell, Secretary, Department of Labour and National Service to the Secretary, DEA, 9/12/49, in NAA A 1838/278, Item 856/13/7 Pt 5.

from continuing human rights violations, but that injured individuals would have a right of redress. The individual was not to require the consent of his/her State to proceed to the international tribunal. This individual-centred view was to be reflected also in Australia's responses to other initiatives.

Australia was implacably hostile to suggestions that human rights violations be addressed in the context of General Assembly discussions or other political channels. Australia opposed the United Kingdom proposal that individuals be able to petition the General Assembly for relief on the basis that under the scheme individuals required State sponsorship to petition the General Assembly and that the scheme would have the unfortunate tendency to turn human rights into political issues.[89] A similarly hostile reaction was given to the United States-Chinese proposal for State-to State mediation on the basis that there would be no enforcement machinery, that implementation would peter out if the committee of three (the two States and a third appointed by the Secretary-General) failed and that intervention would be 'a diplomatic act, and would take place, or not, in accord with political interests.'[90]

The only proposal to gain Australian support was the French proposal for a Commission of Inquiry and Conciliation primarily because it shared two pivotal features of the Australian Court proposal: it involved a permanent body, and (at least in its initial versions) gave individuals a right of petition. The Australian delegation, for instance, was instructed to ensure the right of individual petition remained in the Commission model.[91] These themes were clear in the statement of the Australian delegate signalling Australia's preparedness to support the French model:

> Should the Commission decide that the time is not yet ripe for the setting up of an international court, the Australian Government would wholeheartedly support the proposals put forward by Professor Cassin last year, providing for a review of the extent to which the laws of the contracting states are consistent with the Covenant, the

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89 J Humphrey, *op cit* 39. Humphrey comments that in his opinion Australia did not give the United Kingdom proposed Bill of Rights fair consideration because of their misplaced enthusiasm for a court.

90 Memorandum from JDL Hood, Australian Mission to the UN, to the Secretary, DEA, 16/2/49, in NAA A 1838/1, Item 856/13/7 Pt 2.

91 Memorandum from A/g Secretary, DEA to the Australian Mission to the UN, 28/4/49, in NAA A 1838/1, Item 856/13/7 Pt 3.

> examination, if necessary by investigation, of the complaints of states, associations and individuals, and the proposal, where appropriate, of recommendations to the General Assembly. Whilst this would not go as far as we would wish in the protection of human rights, it may well be as far as we can go at the present time, and would clearly make a very important contribution to what we are striving to do.[92]

Australian support was also made conditional upon the Commission being given the power to request an advisory opinion from the International Court of Justice. From its private records, it is apparent that the Australian delegation was hopeful that at least the French proposal might yield a more considered approach to the issue of human rights violations than might otherwise be the case. In addition the persons of 'high repute' to be appointed to such a body were predicted to be 'less likely to be absorbed in political wrangling than the eighteen Government representatives in the Commission on Human Rights'.[93]

The right of petition was discussed separately. As might be expected from its Court proposal, Australia voted in favour of individuals having a right of petition with respect to human rights violation.[94] In disputing claims that United Nations bodies were not well suited to hearing individual claims, Australian delegates pointed to the example of the Trusteeship Council's effective operation.[95] Again in responding to claims that a right of petition would not respect 'national sovereignty',[96] Australia confirmed the statement of the Belgian representative (Delhousse):

> national sovereignty was always raised in international law by those who took a reactionary attitude...if that objection were raised at every stage of its work, the UN would in due course be destroyed.[97]

Australia re-iterated its understanding that Articles 55 and 56 of the United Nations Charter meant that there was not the least doubt concerning the competence and even the obligation of the United Nations to undertake international action in some form or

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92 Statement of Australian Delegate in the Commission on Human Rights, undated, circa 1949 in NAA A 432/82, Item 47/725.

93 Report of Australian Representative to the Third Session of the Commission on Human Rights, in NAA A 1838/1; Item 856/13 Pt 5.

94 UN Doc E/CN.4/SR 118: D McGoldrick, *op cit*, 5-6.

95 A Watt, Australian representative, UN Doc A/C.3/SR 159, 701-702; 26 November 1948.

96 Typical of this response was the statement of Mr Insfran of Paraguay: 'even if the abolition of national frontiers was a legitimate and noble aspiration, it was not one that could be realized as things were at present, and any measures that did not respect the national sovereignty of States would be out of place': UN Doc A/C.3/SR 159, 700; 26 November 1948.

97 A Watt, Australian representative, UN Doc A/C.3/SR 159, 699-701; 26 November 1948.

other. The only debatable question 'was that of the methods and the time'.[98] It would be anomalous if inhabitants of trust territories could approach the United Nations with their human rights complaints, but that inhabitants of metropolitan countries would be precluded from doing so.[99] Instead of accepting the view that Article 2(7) precluded the United Nations considering human rights matters within individual countries, Australian delegates put forward a dynamic view of Article 2(7) such that, even had human rights matters previously been a matter of 'domestic jurisdiction' (a point not conceded),

> certain matters of domestic jurisdiction could be transferred to international jurisdiction. That would not constitute a violation, but rather an exercise of sovereignty. A country would always be free to demand guarantees against irresponsible petitions.[100]

The major driving force behind the Australia's international implementation proposals appears to have been Evatt. Evatt's personal interest in the promotion of an International Court of Human Rights was evident in his early cablegram to Colonel Hodgson and the direction given to Australian delegates to continue pressing for the Court proposal notwithstanding the lack of international support. Indeed, it is likely that Evatt took a central role in initially drafting the proposal as presented to the Paris Peace Conference.[101] At a minimum, as Neville Harper and David Sissons have commented, the Court proposal was consistent with Evatt's 'firm belief that judicial procedures should be more widely utilized at the international level.'[102] Having settled upon the Court as the preferred model of implementation, Australian policy on other alternatives was relatively easily deduced: political models of resolution were unacceptable, the retention of individual rights to petition the United Nations was essential and if possible, impartial judicial bodies were to resolve human rights disputes.[103]

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98 *Ibid.*

99 *Ibid.*

100 *Ibid*, 701.

101 Although Dr John Burton, Evatt's personal secretary at the time of the Paris Peace Conference has recalled that Evatt took comparatively little interest in the texts of the peace treaties, neither Burton, nor Alan Renouf, the other Australians who drafted amendments to the treaties have claimed responsibility for the court proposal: Interview with Dr J Burton conducted by author, Canberra, 1 September 1999; A Renouf, *The Champagne Trail: Experiences of a Diplomat*, Sun Books, Melbourne, 1980, 29-30.

102 N Harper, D Sissons, *op cit*, 258.

103 John Burton has commented that after the San Francisco conference, Evatt took the view that the Department of External Affairs 'knew his position, knew the Charter, and therefore knew what

From whence did Evatt's desires derive? The answer seems to relate more to personal than party-political philosophy. There was little in Australian Labor Party policy that dictated a preference for judicial and international means of dispute resolution. Undoubtedly, Evatt and his colleagues shared a belief in supporting the United Nations and moving away from a reliance on the protection of the United Kingdom. However, Evatt's belief in legal adjudication as the primary method for achieving justice for individuals appears to have fired Australia's enthusiasm for an International Court. As a former High Court judge, Evatt's belief in formal adjudicatory mechanisms is not all that surprising. Equally, it seems to have been Evatt's strong personal belief that it was the State's responsibility to represent the interests of the individual and so seek ways of facilitating the individual's access to the international realm.[104] Dr Burton, his former personal secretary and appointed by Evatt to be Secretary of the Department of External Affairs, has stated that Evatt identified with people rather than institutions and so confronted norms when they did not reflect individual concerns.[105] The fact that Australia's policies were so little shaped by Cold War tensions also seems referable to Evatt's well-documented sense that the Cold War should not dominate policy discussion.[106] His successors were not to share his views.

II. Spender Period

The directions given by Percy Spender as the Minister for External Affairs in 1950 and early 1951 were to produce a fundamental shift in attitude towards issues of international implementation of human rights. In addition to authorising withdrawal of the Court proposal, Spender instituted strong anti-individual petitioning strategies.

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policies to deduce in his absence': J Burton, 'Herbert Vere Evatt: A Man Out of His Time' in D Day, *op cit*, 9. A similar conclusion might be reached about Australia's international implementation policy.

104 *Ibid*, 3.

105 *Ibid.*

106 See, D Lowe, *Menzies and the 'Great World Struggle': Australia's Cold War 1948-1954*, University of New South Wales Press, Sydney, 1999; M Burgmann, 'Hot and Cold: Dr Evatt and the Russians, 1945-1949' in A Curthoys, J Merritt (eds), *Australia's First Cold War, vol 1: Society, Communism and Culture*, Allen and Unwin, Sydney, 1984; 80-108.

During 1949-1951 the United Nations and its subsidiary bodies were perceived as institutions designed to assist States in their efforts to promote human rights, but not to hear the complaints of disaffected, potentially subversive individuals or groups.

In March 1950 the Department of External Affairs prepared a submission for Spender focusing on the available choices regarding the international implementation of human rights. The options outlined were:

(i) an International Court of Human Rights (as previously proposed by Australia);

(ii) ad hoc fact-finding Committees that would be engaged where one State made a complaint against another State (a proposal favoured by the United Kingdom and the United States); and

(iii) a permanent Commission of Inquiry and Conciliation (as proposed by France).

The Department, in keeping with its views in 1949, suggested that the Court proposal was 'quite unreal' given the fundamental differences in philosophy and in legal procedures between East and West:

> A condition precedent to the successful functioning of such a Court is the common acceptance of a basic humanistic philosophy and agreement on fundamental legal concepts and procedures by the States Parties to the Statute.[107]

Spender agreed with the Department's proposal that the Court proposal be referred to the International Law Commission for further study.[108] The Australian representative attempted to have this course adopted by the Commission on Human Rights. However, the Commission did not agree to this course of action, and, as a result of the representations of the Rapporteur, the Commission resolved that the Australian proposal should remain on the continuing agenda of the Commission.[109] In light of its failure to attract substantial support, the Department and Spender's decision to move away from the Court proposal is not surprising. However, what is clear from an investigation of Spender's other policies is that, even had there been sufficient support for the

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107 Copy of Submission from TG Glasheen to Minister of External Affairs, annotated by Spender, in NAA A 1838/1, Item 895/3/12.

108 See Brief for the Australian Delegation to the Eighth Session of the Commission on Human Rights, in NAA A432/20, Item 54/3779 Pt 7.

109 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 201, 12,14; 19 May 1950.

establishment of a Court of Human Rights, it is likely that Australian delegations under Spender would have pressed for amendment of the Court proposal. In particular, it is unlikely that Spender would have been as supportive of individuals and non-government organisations having a right to commence proceedings in the Court of Human Rights.

Of the three options put to Spender in March 1950, the one that attracted his support was the United Kingdom's proposal to have ad hoc fact-finding Committees whose jurisdiction would be limited to inter-State conflicts. Spender rejected the Department's arguments in favour of a Commission of Inquiry and Conciliation (augmented by a High Commissioner for Human Rights),[110] annotating the submission put to him concerning the proposal with the comment: '[t]here is the further objection that it could easily be made a political instrument, and intermeddle in the domestic concerns of any State'.[111] In this brief statement, Spender revealed his abiding concerns and assumptions. First, Spender thought that there was no guarantee that a United Nations body would dispense impartial justice. Instead, such a body was envisaged as vulnerable to manipulation by State actors with differing political ideological agendas. It was a view that was obviously related to the intensified political tensions dominating many of the discussions in the United Nations. Secondly, however, Spender was indicating that he considered that human rights matters were a matter of 'domestic concern' for States, rather than being an appropriate subject for international scrutiny. The focus of Spender's concern was and remained upon providing for stable government. It was thus a heavily State-centric, rather than individually-focused, view.

In late 1950 and 1951, Australia moved towards support for the French model of a permanent body to conciliate inter-State complaints on the basis of it receiving overwhelming international support.[112] Spender's world view of supporting restrictive

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110 Copy of Submission from TG Glasheen to Minister of External Affairs, annotated by Spender, 3/3/50, in NAA A 1838/1, Item 895/3/12.

111 *Ibid.*

112 Submission to Minister of External Affairs, 22/9/50, in NAA A 1838/1, Item 856/13 Pt 10.

implementation mechanisms was to remain influential in shaping other aspects of Australia's international implementation policy.

The dominance of such a State-centric view is apparent in Spender's position on whether individuals should have a right to petition the United Nations with respect to infringements of human rights. In what represented a complete reversal of policy from the Evatt period, Spender directed that Australia oppose individual petitioning mechanisms and be cautious concerning petitions from non-government organisations. In response to a submission from the Department of External Affairs that concluded that it would be premature to have petitions from individuals, Spender explicitly limited the Australian delegation to support for the right of petitions for signatory States alone.[113] In the final weeks of his Ministry, Spender reiterated that petitioning was a privilege that individuals could not be trusted not to abuse.[114] Furthermore, Spender perceived that permitting individuals or non-government organisations to petition the United Nations would run the risk of lowering the prestige and authority of the national law courts. In his view, such arguments overrode theoretical considerations based on individual liberty and political theories.[115] For Spender individual petitioning would:

> inevitably lead to outside interference frequently from people whose chief concern is interference in domestic matters of a State. Further, it will lend itself to agitation within a country for nefarious purposes.[116]

If permitted to petition the international community, individuals might destabilise States. Whitlam as Australia's representative in 1951 echoed this State-centric view. While the State had a responsibility to protect the rights of individuals, international society was to be concerned with the relations of States:

> States were still the greatest societies of the world, both as national entities and as members of the international community. They existed not only to rule, but also to ensure the protection of the people under their control and jurisdiction who owed them allegiance and even those within their jurisdiction who did not owe them allegiance.[117]

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113 Spender's views were expressed in response to a Submission put to him on 24/10/50. The delegation were informed that Spender would 'not countenance' the idea of individuals or non-government organisations being given the right of petition: memorandum from Australian Mission to the UN,NY to the Secretary, DEA, 29/9/50, in NAA A 1838/1, Item 856/13 Pt 9.

114 Spender's views were relayed to the delegation, in Cablegram from DEA to Australian delegation, 20/4/51, in NAA A 1838/1, 856/13/10/6 Pt 2.

115 *Ibid.*

116 Memorandum of AH Tange, Assistant Secretary to Australian representative on Commission on Human Rights, 13/4/51, A 1838/1, 856/13/10/6 Pt 1.

117 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 211, 13; 23 April 1951.

In a dramatic manner befitting the Cold War context of the ongoing negotiations, Whitlam pointed to the potential for a right of individual petitioning to undermine the basis of ordered government:

> Every existing institution was being challenged today. It would be both impolitic and unwise to present an opening to those who were desirous of decrying the principles and institutions of justice.[118]

Colin Moodie, as Australian representative in the Third Committee of the General Assembly, spoke in similar terms against granting individuals a right of petition. To Spender's list of objections, however, Moodie added a 'floodgates' argument.[119] Since individuals in most States made representations to their governments on matters covered by the Covenant, it would only be reasonable, Moodie stated, to assume that many of these people, if dissatisfied with action by their government would proceed to bring their grievance before the Committee.[120] The planned Committee would not have the resources to deal with such a number of complaints, nor should it be required to find such resources when the bulk of such complaints could be dealt with adequately by individual governments.[121]

Slightly more enthusiasm for the concept of non-government organisation petitioning was evident within departmental ranks. In April 1950 the Department attempted to persuade Spender that support might be given to the United States compromise proposal to draft a separate protocol giving non-government organisations the right to petition the Human Rights Committee.[122] Spender was unmoved. After caustically noting that he considered 'non governmental bodies were seeking to extend unduly their authority' through the petitioning proposal, Spender withheld support from this proposal on the basis that it was impossible to know which non-government organisations were in contemplation.[123] The Australian delegation was thus to oppose the proposal.

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118 *Ibid.*

119 C Moodie, UN Doc A/C.3/SR 301, 197; 1 November 1950.

120 *Ibid.*

121 See letter from Australian Mission to the UN, NY to the Secretary, DEA, 2/11/50, in NAA A 1838/1, Item 856/3 Pt 9.

122 Copy of Submission from TG Glasheen to Minister for External Affairs, annotated by Spender, 28/4/50, in NAA A 1838/1, Item 856/13 Pt 8.

123 *Ibid.*

Evident also in Australia's stance on individual petitioning was an increasing use of the shield of 'domestic jurisdiction' as a justification for limiting United Nations involvement in the scrutiny process.[124] Thus, in expressing his opposition to Australia responding to individual communications from Australian individuals, Spender stated:

> These matters have nothing whatever to do with the Commission and we should do what we can to prevent their discussion and if discussed record unequivocably that we will not have outside interference in our domestic affairs.[125]

More ambiguous statements were made in the Commission on Human Rights concerning whether the United Nations had a pre-existing right to be involved in matters of the enforcement of human rights. At the 211th Meeting of the Commission, held in April 1951 immediately prior to Spender's resignation, Whitlam accepted that 'from the very beginning of the present chapter in international relations', the conception that the individual and his rights were of concern to the international community had prevailed.[126] At the same time, however, Whitlam did not accept that the United Nations thereby had any rights to choose expansive methods of international implementation. State sovereignty had to be protected and international inquiry into an individual State's practices could only be permitted to the extent that States agreed to such intervention.[127] For Spender, defending the 'domestic jurisdiction' of States (a field that he saw including human rights practices) was a priority. Submissions to him were returned to departmental officials with references to 'domestic jurisdiction' underlined.[128]

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124 Note this echoes Spenders' concern that the UN was overstepping its mark in relation to non-self-governing territories – a theme in his first foreign policy speech, see Commonwealth of Australia, House of Representatives, *Hansard*, vol 208, 8 June 1950, 4014-5.

125 Memorandum from AH Tange to Australian Representative to Human Rights Commission, 13/4/51, in NAA A 1838/1, 856/13/10/6 Pt 1.

126 HFE Whitlam, Australian representative, UN Doc A/CN.4/SR 211, 12; 23 April 1951.

127 *Ibid.*

128 See for example, Submission to Minister for External Affairs, annotated by Spender, 28/4/50, in NAA A 1838/1, Item 856/13 Pt 8; Watt has highlighted the similarity between the views of Spender during his Ministry concerning the scope of the United Nations' proper authority and those he voiced as a judge on the International Court of Justice in the *Certain Expenses Case*: A Watt, *The Evolution of Australian Foreign Policy, 1938-1965*, Cambridge University Press, Cambridge, 1968, 332-3.

In jealously guarding Australia's domestic jurisdiction against the intervention of the United Nations or the subversive antics of Australian individuals, Spender's approach to international implementation was markedly different from that pursued during the Evatt period. Spender's stance was influenced by a perceived need to preserve Australia from the destabilising effect of communism. Spender's adoption of such a Cold War perspective was typical of Liberal Party politicians during the 1950s. As David Lowe has demonstrated, though some of the anti-communism rhetoric was designed to achieve electoral advantage, Menzies and his Liberal counterparts had genuine fears that communist represented a real threat to Australian society.[129] Liberal Ministers viewed ridding Australia of the communist threat to be one of their central roles.

Yet Spender's shift of direction did not simply relate to whether the international community could be trusted to provide impartial injustice. In so far as Spender consistently spoke of the interest of the State, he was adopting a different focus to that of Evatt. For Spender, the State was the central unit to consider, whereas for Evatt, it had been the individual. Not only was the individual's interest marginalised in the Spender period, but the 'complaining individual' was demonised. Cold War forces thus came together with a State-centrism to produce a restrictive attitude to international implementation. To a large extent, this coalition of forces was to continue to shape Australian policy over the remaining 15 years of the international negotiations.

III. Casey and Bureaucratic Period

During the terms of Richard Casey and his successors as Minister for External Affairs there were few novel developments in Australian policy. Instead, opposition to extensive international implementation powers was further entrenched. Australia continued to resist proposals empowering the United Nations to actively consider the human rights practices of individual States (without that State's consent) such as giving the Human Rights Committee independent powers, establishing a High Commissioner

[129] See D Lowe, *op cit*, Chapter 3.

for Human Rights, or permitting individuals an automatic right to petition the United Nations. Reporting obligations for the ICECSR were supported primarily because they were viewed as not involving undue interference in a State's policies. There was one area in which Casey left a legacy. His abiding policy direction was for Australia not to become isolated. It was an approach that was followed assiduously and led to a softening of some of Australia's stances.

The Commission on Human Rights was in the midst of its Seventh Session when Casey was appointed Minister for External Affairs on 27 April 1951. As noted in the previous section, Australia had privately moved towards supporting the French proposal for a Commission of Inquiry and Conciliation during the Spender period. It was in the Seventh Session that Australia made its public announcement of support for the proposal. Its change of heart was couched in terms of being persuaded in the face of the overwhelming support given to the proposal by other delegations.[130]

Having effectively lost the battle against the establishment of a permanent body, Australian delegations headed by Whitlam spearheaded a campaign to ensure the Commission's operations would be kept within narrowly defined boundaries. The Brief for the Ninth Session of the Commission on Human Rights in 1953, for instance, directed delegates to clarify that the Committee's functions to exercise its 'good offices' would not include actual visits to countries to investigate human rights situations. The Committee was to be restricted to sitting in New York and Geneva and was to be informed by the State parties of the relevant state of affairs.[131] Likewise Whitlam opposed the Committee having any independent power to initiate its own inquiries in the 1953 sittings of the Commission on Human Rights.[132] The underlying approach was to downplay the importance of international implementation mechanisms, seeing them

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130 General Statement made by Representative in Third Committee (accepting implementation procedures), 10 December 1951, in NAA A 1838/1, Item 856/13/22.

131 Brief for the Australian Delegation to the Ninth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/8/1.

132 HFE Whitlam, Australian representative, UN Doc, E/CN.4/SR 341, 4; 9 April 1953.

essentially as supplements to domestic action, an 'exercise of moral influence' rather than a primary method of enforcing human rights.[133]

The legitimate role of the United Nations was regarded as acting as facilitator and 'support agent' for the efforts of States. In the Brief for the Eighth Session of the Commission on Human Rights, for instance, the delegate was directed to support the view that 'the principal function of the Human Rights Committee is to exercise "good offices" and not to endeavour to act as a body concerned with 'bringing offenders to heel.'[134] Similarly Australia supported the appointment of persons with special qualifications on the Committee (rather than political representatives) on the basis that specially qualified persons could assist States between whom a difference had arisen to form a better relationship with each other.[135] It was a conception, however, that led to continued opposition to the United Nations accepting petitions from individuals or organisations and so investigating practices within a State without that State's consent.

When Casey took over as Minister for External Affairs in late April 1951, the Department of External Affairs renewed its efforts to persuade the Minister to authorize the Australian delegation to support petitioning from non-government organisations. Departmental support for petitioning seems to have strengthened particularly once the United Kingdom indicated that if the United States protocol proposal gained majority support, the United Kingdom too would support the proposal. Whitlam, Australian representative on the Commission on Human Rights in the early 1950s, also had some personal sympathy for a system of petitions. At the 245th meeting of the Commission on Human Rights in early May 1951, for example, Whitlam noted that many cogent arguments had been given in favour of individual and non-government organisation petitions that appealed 'not only to the mind, but also to the heart.'[136] Despite repeating Spender's concern about the revolutionary elements that might be let loose through

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133 HFE Whitlam, Australian representative, UN Doc A/C.3/SR 436, 10; 16 March 1954.

134 Brief for the Australian Delegation to the Eighth Session of the Commission on Human Rights, in NAA A 432/20, 54/3779 Pt 9.

135 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 343, 6; 10 April 1953.

136 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 245, 9; 16 May 1951.

allowing individual petitioning,[137] Whitlam indicated sympathy with the view that petitions should be permitted.

According to a draft submission discovered in the Department of External Affairs files, a series of arguments was put to Casey recommending a change in Australia's stance.[138] State to State complaints were said to be unlikely to lead to effective enforcement of the treaties since States would be reluctant to bring complaints for fear of retaliatory action.[139] Only through allowing non-government organisations to petition the United Nations bodies would there be a fulfilment of Article 55 of the Charter, the Department argued. Furthermore, the United States proposal had been amended to include a requirement that the non-government organisations had to be approved by two-thirds of the Committee before they had standing to bring a complaint. This was presented as a safeguard against 'extremist and irresponsible' non-government organisations. The Department also pointed to the fact that no major embarrassment had yet been caused to the administering territories through petitions submitted to the Trusteeship Council. The United States proposal also provided that 'domestic remedies' had to be exhausted before petitions could be permitted to the Human Rights Committee. The Department thus recommended that Australia support petitioning for non-government organisations, but continue opposing individual petitions. As a contingency plan, however, the Department provided that if a majority of delegations were to support petitions from individuals, Australia should insist upon a separate protocol with safeguards for domestic jurisdiction and adequate rules of procedure.[140]

There is no record of the final version of this submission or Casey's response in the Department of External Affairs' files. However, the delegation to the Eighth Session of the Commission on Human Rights in 1953 was instructed to maintain opposition to any

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137 *Ibid.*

138 (Draft) Submission from AH Tange to Minister for External Affairs, 17/5/51, in NAA A 1838/1, Item 856/13 Pt 8.

139 (Draft) Submission from AH Tange to Minister for External Affairs, 17/5/51, in NAA A 1838/1, Item 856/13 Pt 8.

140 *Ibid.*

form of non-State petitioning, but to be mindful of the opinion of the United Kingdom and France.[141] By the Ninth Session Brief in 1954, the Australian delegate was directed that Australia's 'final position' might have to be taken 'with regard to the views of other British Commonwealth countries and the United States'.[142] Thus Casey's response seems to have advised delegates to avoid being isolated, rather than condoning a positive shift in Australian policy. In the 1955 Brief for the General Assembly which was to remain the guide for Australian delegations for seven years, delegations were advised to continue opposing petitions 'unless there was a clear majority vote (including the UK)'. If Australia was likely to be in a minority position, delegates were ordered to report back to the Department on the views of other governments, in particular the United Kingdom.[143]

In expressing Australia's opposition to individual petitioning, Australian representatives adopted arguments that directly contradicted Australia's stance of only several years earlier. Whereas delegates during the Evatt period had drawn analogies between the petitioning system in the Trusteeship Council and that proposed for the human rights Covenant, delegates under Casey and Whitlam's policy control distinguished the two situations. The Australian delegate to the Sixth Session on the General Assembly, for instance stated in the Third Committee:

> The Administering Governments have, under the Charter, accepted definite obligations in relation to Trust Territories of a kind which they do not have in the field of human rights. The Trusteeship Council, to which the petitions are referred is constituted in such a way that there is always a balance between the administering and non-administering powers. Further, the Council has at its disposal the machinery of visiting missions which can on a regular and objective basis investigate the conditions which are likely to be the most frequent subjects of petitions. Moreover, the Trusteeship Council has developed safegaurds, especially Rule 81, on the subject of recourse to Courts of the Administering Authority, and processes of sifting and screening tested by experience. It is highly doubtful whether it would be possible in a Covenant on Human Rights to reproduce the conditions which have made the handling of petitions from trust territories possible. The experience of the Assembly in relation to Human Rights illustrates the difficulty of persuading States even when bound to do so by Treaty to accept investigation of the observance of human rights. [144]

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141 Brief for the Australian Delegation to the Eighth Session of the Commission on Human Rights, in NAA A 432/20, 54/3779 Pt 9.

142 Brief for the Australian Delegation to the Ninth Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/8/1.

143 Brief for the Australian Delegation to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/9 Pt 3

144 Summary report in UN Doc A/C.3/SR 363, 101; 10 December 1951 (RL Harry).

As with other issues such as the reservations clause (discussed in Chapter 5), Australia's stance on petitioning only changed as a result of Australia finding itself in a minority position. In 1965, in the parallel negotiations for the CERD, the Australian delegation suggested that Australia's failure to support the petitioning process was likely to receive adverse comment and lead to implications that Australia supported racial discrimination. The Department of External Affairs prepared a submission for the then Minister of External Affairs, Paul Hasluck. In addition to pointing to the fact that Australia had in practice tended to respond to individual petitions,[145] the submission referred to the virtual unanimity within the Western bloc in favour of supporting strong implementation measures for the CERD. The hope was said to be that such mechanisms would put communist countries and the Afro-Asians on the defensive.[146] The Department considered it unwise for Australia to vote with a group which had reason to be concerned about its own record, and to be isolated from virtually all Western countries. Ultimately, the submission relied upon political 'anti-isolation' reasoning. It thus sought approval for the delegation to vote in favour of the optional petitioning procedure for individuals and to vote in favour of the non-optional petitioning procedure for non-government organisations if abstention would isolate Australia from other Western countries.[147] Minister Hasluck agreed.[148]

Having felt pressured into changing its stance on the petitioning question in the CERD negotiations, Australia followed suit in relation to the ICCPR. The delegation was instructed that it should indicate to the Western powers Australia's readiness to be

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145 This subject is discussed further in Chapter 7.

146 As to concerns about the Communist and Afro-Asian blocs proposal for all implementation measures to be inserted into a separate protocol to the CERD, see letter of JH Hoyle, Australian Mission to the UN, NY to DEA, 21/10/65, in NAA A 1838/1, Item 929/4 Pt 20.

147 Submission from MR Booker to Minister for External Affairs, annotated by Hasluck, 23/11/65, in NAA A 1838/1, Item 929/5/6 Pt 3. Note there was some departmental unease with the tactics of the Western bloc. LJ Lawrey of the Australian Mission communicated to the United States representative, Kotschnig his fear of the risks of promoting 'hasty adoption of politically slanted implementation measures: reported in letter from LJ Lawrey to the Secretary, DEA, 7/12/65, in NAA A 1838/1, Item 929/4 Pt 20.

148 Submission from MR Booker to Minister for External Affairs, annotated by Hasluck, 23/11/65, in NAA A 1838/1, Item 929/5/6 Pt 3.

guided by majority view on the issue.[149] Although noting that Australia's preference was for there to be no individual petitioning in the ICCPR, Australia was not prepared to be isolated. Thus Australia was to avoid final commitment on the matter.[150] On 3 December 1966 Australia voted with the rest of the Western group in favour of the Optional Protocol.[151] As in so many of the cases described in Chapter 5, Australia's change of vote was undertaken reluctantly and did not represent any fundamental conversion about the United Nations' proper role in relation to human rights.

Interestingly, Australia argued that reporting obligations were inappropriate for civil and political rights. According to internal records, Arthur Tange of the Department of External Affairs was responsible for inserting opposition to reporting for civil and political rights into the Brief for the Eighth Session of the Commission on Human Rights.[152] It was said that the Committee would have neither the resources nor the tools to consider State implementation of civil and political rights. By 1953 at the Ninth Session of the Commission on Human Rights, Australia was commenting more explicitly on the distinctions to be drawn between evaluating respect for different categories of human rights. Whereas economic, social and cultural rights were seen as amenable to 'quantitative measurement and statistical presentation', civil and political rights were regarded as dependent on more abstract factors such as legislation and judicial decisions. A Human Rights Committee considering individual instances of alleged breach was better placed to consider a State's respect for civil and political rights than a Committee considering general reports.[153] Put in modern terms, Australia was arguing that it was more feasible to establish objective benchmarks for the achievement of economic and social rights than for civil and political rights. In the 1955 Brief for the General Assembly used by delegations throughout the 1955-1962

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149 Cablegram from DEA to Australian Mission to the UN, NY, 1/11/66, in NAA A 1838/1, Item 929/4 Pt 21.

150 *Ibid.*

151 Cablegram from Australian Mission to the UN, NY to DEA, 3/12/66, in NAA A 1838/1, Item 929/4 Pt 22.

152 Letter from T Pyman to HFE Whitlam, 8/4/52, in NAA A 1838/1. 856/13/10/7 Pt 1; See too HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 429,6; 11 March 1954.

153 Brief for the Australian Delegation to the Ninth Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/8/1.

period on this point, it was said that to insert a reporting procedure into the ICCPR would create 'artificial uniformity' between the Covenants.[154]

Ultimately, Australia surrendered its objections to the reporting obligations, though the change of heart is not fully explained in the files. It is likely that the change was another example of Australia avoiding isolation. The vote for the reporting procedure was carried 82 votes to none, with two abstentions.[155] While not enthusiastic about reporting on civil and political rights, Australia was adamant that whatever be the finalised implementation procedure, it should be included in the body of the ICCPR. In 1966 there was a proposal before the Third Committee that States reporting procedures be included in a separate instrument. RF Osborn, as Australia's representative in the Third Committee, argued that anything that lessened the accountability of States Parties under the Covenant would reduce the instrument's effectiveness.[156] Such an argument was not applied in relation to the petitioning procedures, but Australia did support the inclusion of reporting and inter-State dispute resolution in the body of the ICCPR.

In contrast to its concerns about the implementation of civil and political rights, Australian policy-makers showed very little concern or apprehension concerning the proposed system of periodic reports for economic, social and cultural rights. When the issue first arose in 1952 at the Sixth Session of the General Assembly, the delegate decided to reserve Australia's position while privately expressing the opinion that reporting obligations would not prove too onerous.[157] FHE Whitlam spoke in favour of the use of specialised agencies to review reports by States at the Seventh Session of the Commission on Human Rights in 1951.[158] No specific Ministerial direction has been preserved concerning this point, though as the Briefs were submitted to the Minister for

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154 Brief for the Australian Delegation to the 10th Session of the General Assembly, in NAA A 462/21, Item 575/1.

155 UN Doc A/C.3/SR 1427; quoted in MJ Bossuyt, *op cit*, 632.

156 RF Osborn, Australian representative, A/C.3/SR 1416, 229; 8 November 1966.

157 This stance was recorded in a note for TG Pyman, author unclear, undated, in NAA A 1838/1, Item 856/13/10/7 Pt 1; See too letter of Australian delegate to the Sixth Session of General Assembly to DEA, 22/1/52, in NAA A 1838/1, 929/4/6 Pt 1.

158 HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 206, 22; 18 April 1951.

approval prior to being sent to delegations, it would seem likely that Casey gave his general assent to this approach. By the Eighth Session of the Commission on Human Rights in 1952, Whitlam was stating:

> Once [the progressive realisation of economic, social and cultural rights] ...is realised it follows inevitably that the implementation procedure adopted will have as its essential feature a reporting system. This feature has of course been accepted by Australia which subscribes to the general view that the purpose of such reports would be to reveal achievements and needs and not to provide a basis for criticism and censure.[159]

Rather than fearing that reporting requirements would highlight deficiencies in Australian practice, the Australians expected that compulsory reporting would have the advantage of bringing to light policies in both colonial and non-colonial countries, thereby deflecting some of the criticism of colonial powers.[160] Australia had some concerns about the proposal that countries report on the difficulties they faced in implementing economic and social rights, fearing that this would lead to the United Nations feeling justified in stepping into domestic debates.[161] In public, therefore, its acceptance of reporting requirements was qualified by the understanding that the aim of receiving United Nations bodies would be to assist (rather than stigmatise) the efforts to States to make effective the economic and social rights of their citizens. In so doing, Australia expressed confidence that the United Nations would not seek to go beyond its responsibilities and resources.[162]

Similarly, proposals for a specialist committee for the ICESCR prompted little debate in Australia. In October 1966, for instance, the Department of External Affairs expressed the view 'We cannot see any particular reason to resist the committee idea and feel that

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159 Draft Report of Australian Representative to the Eighth Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/7 Pt 1.

160 *Ibid.* Note, however, not all were in agreement with this stance. The Department of Territories expressing the concern that reports had been used by some of the non-administering States to level 'uninformed and exaggerated criticism against the policies of the administering Governments': letter from the Secretary of the Department of Territories to the Secretary, DEA, 16/4/52, in NAA A 518/1, Item 104/5/2 Pt 2. The concern of the Department of Territories was included in the Brief for the Australian Delegation to the Ninth Session of the Commission on Human Rights, in NAA A 1838/1, 856/13/10/8/1.

161 Cablegram from DEA to Department of Education, 31/3/52, in NAA A1838/342, Item 929/4/4 Pt 2.

162 RL Harry, Australian representative, UN Doc A/C.3/SR 363, 101; 10 December 1951; See to similar effect, earlier comments of HFE Whitlam, Australian representative, UN Doc E/CN.4/SR 238,18; 11 May 1951.

we can leave the handling of it generally, to the discretion of the delegation'.[163] The delegation indicated some support for the Committee in the public debates[164] but the proposal was rejected by a majority.

In the forefront of bureaucrats' minds in ultimately supporting reporting provisions for the ICCPR and ICESCR was a perception that the international bodies receiving the periodic reports of States had limited powers. In particular, the implementation bodies were regarded as having no power to make comments on the human rights practices of individual countries. In a paper prepared for circulation to other Departments in 1967, Patrick Brazil (the then outposted Legal Adviser to the Department of External Affairs from the Attorney-General's Department) made the following comment:

> The limitation on the Council and the Commission to making general recommendations should mean that these bodies will not single out situations in individual countries for special comment and criticism.[165]

Likewise in relation to the Human Rights Committee, Brazil stated:

> It is to be noted that under Article 41 the Committee is not given any competence to decide complaints or even to make recommendations for their solution.[166]

No reference was made to the optional protocol to the ICCPR in explaining the potential breadth of the ICCPR. Although this memorandum was prepared after the conclusion of the Covenant debates, it is likely that Brazil's understanding corresponded with those of the Department of External Affairs as of the date of the Covenants being finalised. It is thus highly significant in demonstrating the minimalist view of international implementation embraced. If, as is likely, this interpretation was accepted by recipient Departments, it would have helped to create a sense of complacency about the significance of the international implementation bodies.

Certainly, Australian policy-makers in this period remained opposed to the development of more interventionist international models of international implementation. Whitlam, for instance, wrote to the Solicitor-General, Kenneth Bailey, in 1955 providing adverse commentary on Luis Katner's paper dealing with, *inter alia*, an International Court of

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163 Memorandum to MR Booker, unsigned, 20/10/66, in NAA A 18381, Item 929/4 Pt 21.
164 RF Osborn, Australian representative, A/C.3/SR 1416, 229; 8 November 1966.
165 P Brazil, Background Paper on the Covenants, 27/6/67, in NAA A 1838/1, Item 856/13/7 Pt 2.
166 *Ibid.*

Human Rights. Whitlam clearly viewed such a proposal as going outside the realm of Article 2(7) of the Charter and the existing realms of international law. He stated:

> the author's argument fails to recognize that the United Nations is not an organic union of any sort, but is merely an organization of sovereign States, the argument also accepts the views of the perfectionist school of international lawyers as to interpretation of the Charter in relation to human rights and as to the limited effect of Article 2(7)...
> The author has too readily accepted the view that International Law has developed to the point where individuals may be recognized as subjects. That is only a comparatively recent idea and it has certainly not been universally accepted. There is grave doubt, too as to whether such an idea and, with it, the idea that a right of petition inheres in the individual, should be accepted...[167]

In a State-centric comment that Spender would no doubt have endorsed, Whitlam quoted from Arnold McNair:

> However attractive from the point of view of human rights the proposal may be, it must be remembered that the litigation of a claim between a private individual and a foreign government before an international tribunal is capable of exciting national feelings between two States, and I submit that an individual uncontrolled by his Government ought not to be allowed to make that possible...[168]

Australia also withheld its support from proposals to establish a High Commissioner for Human Rights. In the early 1950s the focus of Australia's objections was the lack of a suitable world climate. Whitlam privately indicated that he saw a role for an Attorney-General or High Commissioner for Human Rights.[169] Publicly, Australia did not give any support to the proposal. In 1965, the United States had renewed its calls for the establishment of such a post. The Australian Mission viewed the United States push in cynical terms. To the Department of External Affairs, the Mission declared that the United States was attempting to re-assert world leadership and broaden the scope of human rights investigations in order to bring to an end the disproportionate attention that United States race policies had attracted.[170] The Department of External Affairs was forthright in opposing the proposal. First, it expressed the view that the West could be unduly harmed since information critical of the West was more readily available to communist countries than vice-versa. Secondly, it considered that communist countries were unlikely to cooperate with a High Commissioner and feared that African countries

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167 Memorandum from HFE Whitlam to Solicitor-General, KH Bailey, 2/8/55, in NAA A 432/68, Item 68/2797 Pt 3.

168 The quotation was taken from AD McNair, *The Development of International Justice*: *ibid.*

169 Filenote of conversation between HFE Whitlam and unidentified DEA official, 2/52, in NAA A 1838/1, Item 856/13 Pt 10.

170 Cablegram from Australian Mission to the UN to DEA, 18/2/65, in NAA A 1838/1, Item 929/4/11 Pt 1.

might move defensively to widen the mandate of the High Commissioner to include (or indeed prioritise) issues of colonialism and racial discrimination. Such a move might prove embarrassing in light of Australia's immigration policies. Thirdly, it was regarded as expanding the United Nations' power to look into the internal affairs of Member States and that it had been a fundamental tenet of Australian policy that the United Nations should not interfere in the domestic policies of members.[171]

The grounds of Australian opposition to the High Commissioner for Human Rights proposal serve as a useful demonstration of the interplay of factors influencing Australian policy. Cold War and anti-colonial tensions were taken into account in perceiving that United Nations bodies could be manipulated in terms of the priorities they established. At the same time, there was a State-centred attitude, similar to that espoused by Spender and Whitlam, that led to challenges being mounted to the United Nations' power to engage in country-specific human rights investigations. Finally, there was a desire to avoid adverse comment on Australian policies. Together these influences combined to shape a policy of supporting minimalist forms of international implementation wherever possible.

To a large extent, the reasons for the adoption of such policies in the Casey and Bureaucratic period mirror those applicable in the Spender period. International tensions remained high, as anti-colonial sentiments joined with Cold War tensions to produce a bitterly divided United Nations. Even had there been less tension, however, Australia would still have been likely to adopt restrictive implementation policies in view of the State-centrism that had become an entrenched part of Australian policy. Spender, Casey and Whitlam, the primary architects of the Australian policy up until the mid-1960s took a narrow view of the United Nations' proper role in the area of human rights and an expansive view of the State's right to limit United Nations involvement in human rights. By the late 1960s bureaucratic and political aversion to

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171 Cablegram from DEA to Australian Embassy, Washington, 19/11/65, in NAA A 1838/1, Item 929/4/11 Pt 1.

being isolated combined with a defensiveness about Australia's racial record to produce a softening of Australia's policies. However, viewed in context, these late shifts were only superficial in nature. The current favouring minimalist forms of international implementation remained strong.

Conclusion

This Chapter has revealed the shrinking nature of Australia's enthusiasm for international implementation of human rights, at least in the area of civil and political rights. Australia in the early Evatt period advanced proposals for judicial modes of international adjudication that would involve individuals, non-government organisations, the State and the international community. By the late 1960s Australia had moved towards withholding support from any but the most narrowly defined proposals for inter-State, consensual models of dispute resolution and limited reporting obligations. While Liberal Ministers certainly reflected Cold War-style suspicion of subversive communist forces, individuals, non-government organisations and States, the Cold War does not provide a complete explanation for the shifts. Instead, one must look also to the personal political philosophies of the dominant actors about the nature of international society, and the role of the State vis-à-vis the individual. Evatt's early focus on the individual as the centre of States and international society came to be replaced by an emphasis on the State championed by Spender and Casey and the successive bureaucrats who framed Australian policy. Australia's final votes in support of the implementation procedures thus disguise a myriad of operating, limiting assumptions.

In the area of economic and social rights, there is a slightly different narrative evident in this Chapter. Australian policy-makers were consistent in supporting non-judicial forms of implementation for economic and social rights. Interestingly, however, policy-makers considering the system of periodic reports to the Economic and Social Council appeared confident that benchmarks could be established for the achievement

of economic and social rights. In light of the conclusions of Chapter 5, the benchmarks were likely to have been set low, at least by decision-makers in the 1950s and 1960s. However, the consistent acceptance by Australian policy-makers of economic and social rights' amenability to review by external bodies remains significant.

Overall, what this Chapter highlights, is the lack of unanimity among Australian State actors concerning the scope of the United Nations' proper power in relation to human rights. The resultant tensions in Australian policy were mirrored in relation to Australia's attitudes towards United Nations involvement in scrutinising human rights violations outside the context of the human rights Covenants, a subject dealt with in Chapter 7.

Chapter 7

Human Rights and 'Domestic Jurisdiction'

Introduction

An underlying tension in negotiations for the International Bill of Rights was the extent to which the United Nations had a valid role in scrutinising the human rights practices of individual countries. The issue of whether human rights were *a priori* a matter of exclusive 'domestic jurisdiction' under the United Nations Charter, or conversely were a matter of pre-existing 'international concern', cut across the boundaries of United Nations fora. Attitudes on this point fundamentally affected views on the significance to be attributed to the human rights Covenants: that is, whether they constituted new and exclusive rules of engagement for the international community in dealing with individual States' infringements of human rights, or whether they would be a counter-part to the United Nations' pre-existing authority in the human rights area.

Given the varying invocations and rebuttals of 'domestic jurisdiction' arguments by Australian delegations seen in Chapter 6, it is useful to complete the discussion of Australia's implementation policies by examining in closer detail the Australian approach to the United Nations' power to scrutinise the human rights practices of States otherwise than as endorsed by the draft Covenants. This Chapter focuses on two particular aspects of the domestic jurisdiction debate: (a) the General Assembly's power to discuss and make recommendations concerning individual State's human rights practices under the United Nations Charter and (b) the Commission on Human Right's powers in relation to individual petitions received during the negotiations of the International Bill of Rights. The picture that emerges in relation to each subject reveals the complex interplay of legal opinions, international politics, domestic sensitivities and dominant personalities in producing at times paradoxical policies.

A. General Assembly Scrutiny of States' Human Rights Records

Overview of the International Debate

As noted earlier in this thesis, the United Nations Charter committed the United Nations to the promotion of universal respect for and observance of human rights and fundamental freedoms for all. Article 55 of the UN Charter states in part:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> ...
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Member States pledged themselves to take joint and separate action in pursuance of this aim in Article 56 of the Charter. Article 10 provided that the General Assembly was to be able to:

> discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided for in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

The Charter also, however, included an overall qualification. Article 2(7) stated that:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

In the field of human rights, debate raged as to the significance of Article 2(7). One view was that an individual State's human rights record constituted a matter 'essentially within the domestic jurisdiction' of a State. While the General Assembly would have power to discuss human rights in general terms, the effect of Article 2(7) was to prevent the General Assembly acquiring any power to discuss and make recommendations on an individual State's human rights record. Another view was that human rights (and States' implementation of them) had been taken out of the scope of matters of domestic jurisdiction through being mentioned in Articles 55 and 56. Accordingly, the operation of Article 2(7) had no effect in preventing the General Assembly using its Article 10 power to discuss and make recommendations on an individual State's human rights

record. A variant on the non-applicability of Article 2(7) theme was that the General Assembly's action in discussing individual practices did not constitute 'intervention' under Article 2(7). Sir Hersch Lauterpacht, for instance, advanced the view that 'intervention' required 'a peremptory demand accompanied by enforcement or the threat of enforcement in the case of non-compliance'.[1]

From its earliest days of operation, the General Assembly was plagued by debate as to its proper role when States made allegations of human rights violations against other States and wished the General Assembly to take condemnatory action. Some items such as concern over the execution of Greek trade unionists in 1949 had only a limited shelf-life within the General Assembly whilst other items such as South African apartheid policies were to remain on the General Assembly's agenda for decades. As a member of the General Assembly, Australia was required to formulate a position on the listing and treatment of these matters.

I. Evatt Period

During the Evatt period, an expansive interpretation was given to the General Assembly's power to consider and take action on the human rights practices within individual countries. Notwithstanding Australia's insistence during negotiations of the Charter that Article 2(7) prevented the United Nations from becoming involved with matters like Australia's immigration policy, once the United Nations began operating Evatt and Australian delegations were active in encouraging the General Assembly to concern itself with human rights violations in Eastern Europe.[2] Divisions of opinion on the scope of Article 2(7) as between Evatt and some of his bureaucratic advisers were a constant feature of the period, though Evatt's views enjoyed general priority. At the same time, however, Evatt recognised that many members of the international

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1 H Lauterpacht, *International Law and Human Rights*, Stevens and Sons, London, 1950, 168. For a general account of the debate over domestic jurisdiction, see JES Fawcett, 'Human Rights and Domestic Jurisdiction', in E Luard (ed), *The International Protection of Human Rights*, Camelot Press, London, 1967, Chapter 11.

2 See text below, 273-275.

community might require further proof of the General Assembly's power in the form of an International Court of Justice judgement and so at times supported referral of the 'domestic jurisdiction' question to the Court. Yet even Evatt was open to softening Australia's stance in order to accommodate competing foreign relations goals, particularly the protection of Commonwealth allies.

That Australia should have supported any General Assembly action in relation to the human rights practices of individual countries has puzzled a number of commentators such as Neville Harper and David Sissons,[3] Alan Watt,[4] Geoffrey Sawer[5], and Bill Hudson.[6] All these commentators have espoused the view that at the San Francisco Conference, Evatt was committed to insulating a wide range of domestic policies from the scope of international scrutiny. Geoffrey Sawer and Alan Watt, for instance, suggest that Evatt's baseline attitude was to insulate all domestic policies from international scrutiny and attribute subsequent exceptions to this policy to political expediency or confusion.[7] Neville Harper and David Sissons conclude that despite advocating a full employment clause, Evatt did not intend for domestic policies aimed at realising full employment to be examined internationally.[8] According to this accepted wisdom, human rights policies, too, would have been regarded as outside the scope of proper international jurisdiction. A re-analysis of Australia's contribution at the San Francisco Conference reveals less hostility towards international scrutiny of human rights issues than has been hitherto been accepted.

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3 N Harper, D Sissons, *Australia and the United Nations*, Manhattan Publishing Company, New York, 1959.

4 A Watt, *The Evolution of Australian Foreign Policy: 1938-1965*, Cambridge University Press, Cambridge, 1968.

5 G Sawer, 'The United Nations', in G Greenwood, N Harper, *Australia in World Affairs: 1950-1955*, FW Cheshire, Melbourne, 1957, 98-100.

6 WJ Hudson, *Australia and the New World Order: Evatt at San Francisco, 1945*, Australian Foreign Policy Public Program, Australian National University, Canberra, 1993, Chapter 9.

7 G Sawer, *op cit*, 98; A Watt, *op cit*, 89-90. See too P Hasluck, 'Australia and the Formation of the United Nations: Some Personal Reminiscences' (1954) 15(3) *Royal Australian Historical Society Journal and Proceedings* 134, 139 where Hasluck states that Australian policy subsequent to San Francisco was 'always confused and self-contradictory on the subject of domestic jurisdiction'.

8 N Harper, D Sissons, *op cit*, 62. Harper and Sissons conclude that the position taken by Evatt concerning Article 10 of the UN Charter in later discussions of the General Assembly was 'fundamentally inconsistent' with his stance at San Francisco: *ibid* 166.

Evatt certainly spoke in strong terms about the need for Article 2(7) in the United Nations Charter. In expressing support for the inclusion of Article 2(7), for instance, Evatt stated that its terms were :

> really implicit in any organisation that is genuinely international in character. No such organisation should be permitted to intervene in those domestic matters in which, by definition, international law permits each state entire liberty of action.[9]

Australia even suggested initially that the clause limit the Security Council's powers.[10] Yet of central importance in the current context was Australia's proposal that Article 2(7) extend to matters 'essentially' within the domestic jurisdiction of a State, rather than matters 'solely' within the domestic jurisdiction.[11] Clearly the term 'essentially' was intended to cover a broader ambit of domestic policies than the term 'solely'.[12] Yet the preference for a broader clause does not of itself lead inexorably to the conclusion that Australia regarded human rights matters as encompassed by the notion of matters essentially within a State's domestic jurisdiction.

Rather than referring to the exemption of all domestic policies in advancing the amendment, Australian delegations revealed a desire to insulate one specific subject area: immigration. In its general report on the San Francisco Conference, for instance, the Australian delegation was scathing of the original terminology for Article 2(7) on the basis that it might have given the Security Council power to intervene over issues such as migration:

> under the draft Chapter as it stood [after London], therefore, such matters as migration policy would have become subject to the jurisdiction of the Security Council immediately an aggressor threatened to use force. Indeed, the Dumbarton Oaks text would almost have amounted to an invitation to an aggressor to use force, in the hope of inducing the Security Council to extort concessions in the interests of maintaining peace.[13]

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9 Memorandum Submitted to Committee 1/1 on 11th June 1945, by Evatt, 'UN Charter –UNCIO Folder', Evatt Collection, Flinders University.

10 In analysing the Dumbarton Oaks proposal for the Charter, Australia was concerned that if the Security Council had power to intervene in domestic matters where peace was threatened, an aggressor State might manufacture a threat to the peace in order to wring concessions from a State faced with the spectre of Security Council intervention. Australia subsequently directed its attention more squarely at limiting the situations in which the Security Council's powers were engaged: see JDE Plant, The Origins and Development of Australia's Policy and Posture at the United Nations Conference on International Organisation, San Francisco, 1945, PhD Thesis, Australian National University, 1967, 363-5.

11 G Sawer, *op cit*, 99.

12 Report on San Francisco Conference, 'United Nations - Conference on International Organization, San Francisco, 1945' Folder, Evatt Collection, Flinders University.

13 Report on San Francisco Conference, *ibid.*

The report also stated that Evatt took the opportunity during the discussion on the Australian proposal to make clear that Article 2(7) was 'a recognition, among other things, that migration policy cannot become the subject of any action by the United Nations' outside the Chapter VII context.[14]

A strong argument can be made that Evatt's desire to insulate Australian immigration policies was not synonymous with an intention to insulate Australia's 'human rights practices'. From the discussion of substantive rights in Chapters 2 and 3, it will be recalled that Australia denied that there was any right to be given asylum or to migrate to a particular country. All that would be conceded was a right of individuals to seek asylum.

One piece of evidence, however, presents a particular challenge. In the course of speaking against the Security Council's potential power to intervene where minorities were repressed, the Official Report of the Australian delegation states that Australia suggested the treatment of minorities should be taken 'out of the ambit of domestic jurisdiction' by the conclusion of a human rights convention. The clear implication of this statement was that rights of minorities could be considered human rights matters and also *prima facie* within the 'domestic jurisdiction' of a State.

Having regard to the terms of the memorandum by Evatt that presumably formed the basis of the speech to the San Francisco Conference, it would appear that the subsequent Report misstates the intention of Evatt. Evatt's original memorandum stated:

> If the members of the Organization really desire to give the Organization the power to protect minorities, their proper course is either to declare that they recognize the protection of minorities as a matter of legitimate 'international' and not merely of 'domestic concern' or to make a formal international convention providing for the proper treatment of minorities...
> Once a matter is recognized as one of legitimate international concern, no exception to the general rule is needed to bring it within the powers of the Organization. The

[14] *Ibid.*

> general rule ceases to apply as soon as the matter ceases to be one of domestic jurisdiction.[15]

The fuller statement is important in so far as Evatt did not label the treatment of minorities a 'human rights issue'. Nor did he speak of incorporating the treatment of minorities into a 'human rights convention'. Instead, he referred to the treatment of minorities as a distinct subject and affirmed that it, as a subject, was a matter of 'domestic jurisdiction'. This too is consistent with Australia's stance that minorities did not have special rights (discussed in Chapter 3). The bureaucrats responsible for the final version of the Official Report appear to have introduced the confusing equation of minority rights and human rights.[16] From Paul Hasluck's recollections, this may have been deliberate. Hasluck reports that even at San Francisco, Alan Watt, Kenneth Bailey and Paul Hasluck sought to rein in Evatt's policies 'to bring his mind back to some of the dangers Australia might be facing'.[17] Hasluck admits the example that carried the most weight with Evatt was immigration.[18] Having regard to Evatt's original language, it would appear that it was the view of his advisers rather than Evatt that the whole category of human rights be exempted. For Evatt, while matters like immigration and the treatment of minorities would be exempted under Article 2(7), the United Nations would be free to discuss the full range of (properly classified) human rights matters.

Evatt's (unpublished) records of the San Francisco Conference in fact confirm his willingness to have the General Assembly take action in respect of human rights matters. In his draft report on the San Francisco Conference,[19] Evatt welcomed the prospect of the United Nations taking an active role in considering human rights matters. Evatt noted that the Assembly was likely to engage in frank criticism of action both national and international likely to prejudice peaceful living:

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15 Evatt's memorandum is quoted in an unpublished paper by the Australian Institute of International Affairs (Commonwealth Council), 'Australia and UN Intervention', Carnegie Endowment UN Project, Data Paper No 3, in Kenneth Bailey Papers, NLA Manuscript Collection, MS 4622, 2.

16 Paul Hasluck reports that he, Kenneth Bailey, Alan Watt and Ronald Wilson wrote the Official Report: P Halsuck, *Diplomatic Witness*, Melbourne University Press, Melbourne, 1980, 218.

17 *Ibid.*

18 *Ibid.*

19 Evatt's draft Report on the San Francisco Conference, 'United Nations – Conference on International Organisation, San Francisco, 1945' Folder, Evatt Collection, Flinders University. The report appears to have been finalised by bureaucrats: see fn 16 above.

> [f]or example, the Charter is specific regarding respect for and observance of human rights. An infringement of human rights in any country is likely to be commented upon.[20]

Viewed in this light, it comes as little surprise that Evatt supported the General Assembly's discussion of, and making of recommendations concerning, specific human rights violations. What require more explanation are the reasons for Australia's occasional lapses of enthusiasm for such intervention.

Australian practice in the General Assembly 1946-49

In the matters in which Australia took a prominent role, Australia endorsed a broad view of the General Assembly's potential jurisdiction in human rights matters. This is most apparent in the initiative taken by Australia in respect of unfolding events in central Europe. In 1948, for instance, Australia took the lead in placing on the General Assembly's agenda the topic of the 'observance of fundamental freedoms and human rights in Bulgaria and Hungary, including the question of religious and civil liberty, in special relation to recent trials of Church leaders'.[21] Australia was not alone in its concern with apparent persecution of religious leaders in Eastern Europe,[22] in particular with issues relating to the legal proceedings brought against Cardinal Mindszenty of Hungary.[23] What was remarkable about the Australian stance was that unlike other critics who wished to rely purely on breaches of the Peace Treaties[24] to establish the United Nations jurisdiction in the matter, Australian delegates relied on Articles 55 and 56 of the United Nations Charter.

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20 *Ibid.*

21 The reference to Romania was inserted at the Fourth Session of the General Assembly.

22 Detailed briefing papers were prepared, for instance by the Commonwealth Secretariat: see Cablegram from the Secretary of State for Commonwealth relations, to DEA, 22/6/49, 'London: January-July 1949' Folder, Evatt Collection, Flinders University.

23 Cardinal Mindszenty was charged for treason after speaking out against State controls on religion. The Hungarian government had suppressed exercise of the Catholic and Uniate Churches.

24 The Peace Treaties were the treaties negotiated between the allies and central European States at the Paris Peace Conference of 1946. The treaties included a provision obliging States to respect human rights and fundamental freedoms. As to the Paris Peace Conference, see: S Kertesz, *The Last European Peace Conference: Paris 1946 – Conflict of Values*, University Press of America, Lanham, 1985; Reliance on the Peace Treaties giving rise to an international situation was the preferred approach of, for instance, the United Kingdom: see Note by TG Glasheen on Violation of Fundamental Human Rights by Satellite States, 17/3/49, in NAA A 1838/283, Item 852/10/18 Pt 1

In putting forward the topic for consideration by the General Assembly, Evatt, then Chair of the General Committee of the General Assembly, advanced a broad view of the General Assembly's legal competence. First, Evatt referred to Article 10 of the United Nations Charter:

> The right of discussion provided for in Article 10 of the Charter was one of its most important provisions. There was not a single question or matter coming within the scope of the charter, relating to its aims, its principles, or any of its provisions, which could not be discussed by the General Assembly. If any question was covered by an article of the Charter, that question would no longer be a matter essentially within the domestic jurisdiction of a State.[25]

Given that Article 55 imposed a duty on the United Nations to work in the field of human rights, Evatt argued that the General Assembly, through the combined operation of Article 10 and Article 55, had competence to consider the observance/non-observance of human rights by a United Nations State member. More audaciously, Evatt supported the United Nations having the power to consider the human rights records of States which were not members of the United Nations on the basis that Article 10 was 'essentially universal' in scope.[26]

By outlining the attempts Australia had previously made to determine what was happening in Cardinal Mindszenty's trial in Hungary, Evatt may have been implying that international discussion and action should be regarded as a last resort after State to State dialogue had failed. Evatt informed the General Committee that Australia had made six attempts to obtain permission for its representatives to be present at the trial as observers.[27] Indeed, Australia continued to make individual representations to Hungary in relation to the ongoing trials of religious leaders.[28] What Evatt was rejecting, however, was that inter-State approaches constituted the only means of redress available for concerned States. Evatt was happy for the details of the alleged violations to be evaluated by the General Assembly. In 1949, for instance, Norman Makin, the Australian representative, presented a summary of the evidence before the Political Committee to the General Assembly. He spoke at length on the evidence available to

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25 Evatt's statement quoted in the unpublished paper, 'Australia and UN Intervention', *op cit*, 6.

26 Dr HV Evatt, Chair of General Committee, UN Doc A/GC/ SR 58, 15; 6 April 1949.

27 *Ibid.*

28 See for example, Cablegram from DEA to High Commissioner's Office, London, 22/1/49, 'Cables - London - August-November 1949' Folder, Evatt Collection, Flinders University.

the Commission concerning the breaches of human rights. He outlined allegations concerning improper interference in the administration of justice, control of the legal profession, inequality under the law, and interferences in individuals' freedom of religion.[29]

In participating in this debate, Australia was not simply supporting a position of generally 'discussing' the practices. It was pushing for the General Assembly to pass a Resolution stating that the actions in Bulgaria, Hungary and Romania were a matter of general concern and warranted the appointment of an investigative committee under Article 55.[30] Only when it was apparent that a majority of delegates would not support a strongly worded condemnatory Resolution did Australia move to supporting Resolutions referring primarily to the treaties and the European powers' responsibilities to participate in conflict resolution procedures under those treaties.[31] In 1949 Australia voted with the majority for referral of the question whether a dispute under the Peace Treaties existed to the International Court of Justice.[32]

It is noticeable that, in their advocacy of General Assembly action, Australian delegates did not mention Article 2(7) of the Charter. In their view the express powers given to the United Nations (Article 10, in combination with Articles 55 and 56) were sufficient to establish the General Assembly's power. Article 2(7) had no relevance in that it neither granted nor took away the power of the Assembly. This view is clearer in the debates concerning international implementation of human rights discussed previously in Chapter 6. At the Paris Peace Conference, for instance, the Australian delegates' Brief included a statement by Professor Norman Bentwich that cases involving human rights:

> are not matters of purely domestic character such as are excluded from the intervention of the organ of the United Nations, for one of the main purposes of the

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29 N Makin, Australian representative, UN Doc A/SR 235, 148; 22 October 1949.

30 N Harper, D Sissons, *op cit*, 151.

31 As to the Resolutions, see *ibid.*

32 *Ibid.* The International Court of Justice in 1950 determined that the central question for it to answer was whether the settlement of dispute procedures under the Peace Treaties was applicable, a question which it said was clearly international in character such that it was not necessary for the court to consider the scope of Article 2(7): see *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, ICJ Rep 1950, 65. A further ruling was handed down after States refused to appoint representatives to a settlement procedure: ICJ Rep 1950, 221.

> United Nations Organization is to secure those human rights and every member of the United Nations Organisation is obligated to assure them to all the inhabitants of its territories.[33]

Human rights were thus perceived as matters of international concern, justifying international action.

Admittedly, Australia did not always push strongly for immediate General Assembly action on human rights violations. Australia made no statement in relation to Soviet attempts to have a Resolution calling upon the Greek government to stay the execution of Greek trade unionists at the Third Session of the General Assembly.[34] When the issue of the freedom of movement of Russian women married to foreigners was raised in the General Assembly, Australia supported a Chilean proposed Resolution condemning the Russian actions, but also suggested that the International Court of Justice be requested for an opinion on whether international law had been breached.[35] More notoriously, Australia did not support broadly worded Resolutions condemning South Africa for its treatment of its Indian population.[36] Its practice in relation to the Indian item was indeed variable. In the First Session of the General Assembly Australia supported reference of the 'domestic jurisdiction' question to the International Court of Justice.[37] At the Second Session Australia voted against a Resolution calling upon the interested States to have a round-table discussion and condemning South African action.[38] It supported, however, a Resolution calling upon the parties to attempt to mediate and conciliate the issue and, failing that, to refer the matter to the International

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33 Brief for the Australian Delegation to the Paris Peace Conference, in NAA A 1067/1, Item E 46/36/8.

34 For further details of the Australian stance, see N Harper, D Sissons, op cit, 153. Note though Harper and Sissons take a different view of the significance of Australia's abstention – suggesting that Australia might have been expected to vote against the Resolution had it not been for its concern at the actions of the Greek government.

35 See N Harper, D Sissons, *op cit*, 152. Australians sought clarification of whether restrictions on the movements of members of the families of foreign diplomats was contrary to international law. The allegation was that the Soviet Union was preventing the Soviet-born wives of foreigners to leave Russia to join their husbands.

36 India in 1946 complained that contrary to its agreement with South Africa (the Cape Town Agreement of 1927) and the UN Charter, South Africa was discriminating against persons of Indian ethnic origin living in South Africa. India was particularly incensed by the *Asian Land Tenure and Indian Representation Act 1946* that limited where Indians could reside and purchase land: see N Harper, D Sissons, *op cit*, 146.

37 Australia did not comment on initial discussions of the matter and opposed the original condemnatory Resolution of the General Assembly. In the plenary session, Australia supported an alternate proposal to request an advisory opinion on Article 2(7): *ibid.*

38 Australia's attitude discussed: *ibid*, 147.

Court of Justice.[39] By the Third Session, Australia supported a United Nations sponsored round-table discussion.[40]

Rather than revealing growing doubts as to the General Assembly's powers, this mixed practice appears to have been influenced by political factors. In none of these cases did Australia speak against the General Assembly's power to consider and take action on the various topics. In the 'Greek trade unionists' case, Australia abstained on a Resolution denying the Assembly's competence in the matter.[41] In the debates on South Africa, despite pressure from South Africa and the United Kingdom for Australia to support their Article 2(7)-based objections, Australia desisted. A cablegram from the delegation to the Department of External Affairs in 1946 made clear the contemporary understanding: 'We understand our instructions are not to support contention that the Assembly is barred by Article 2(7) from discussing the matter'. The delegation instead sought specific directions on the matter of an advisory opinion of the court on the jurisdiction matter.[42] In such circumstances, Australia's support for referral to the International Court of Justice seems to have been motivated by a desire that the matter be resolved so that time-consuming debates on the matter could be avoided. It was thus seen as a means of supporting, rather than undermining, General Assembly action.

More prosaic political motivations also came into play in shaping Australia's policy on General Assembly Resolutions concerning South Africa. A desire to avoid offending South Africa was clearly a major determinant of Australia's prevarication over the South African-Indian item. Memoranda originating in the Australian Mission to the United Nations refer to a desire to avoid the prospect of embarrassing British

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39 *Ibid.*

40 Australia initially proposed a Resolution that called on the governments to renew their efforts to reach an agreement without mentioning the UN Charter or the Declaration. When this proposal failed, Australia supported the French-Mexican proposal for a round-table discussion of India, Pakistan and South Africa 'taking into consideration the purposes and principles' of the UN Charter and the Declaration: N Harper, D Sissons, *op cit*, 148.

41 *Ibid*, 147.

42 Cablegram from Australian Delegation to UN Assembly to DEA, 1/11/46, in NAA A 1067/1, M 46/21/7 Pt 1.

Commonwealth relationships with South Africa, India or the United Kingdom.[43] When South Africa's policies with respect to South-West Africa were raised in the Fourth Committee, Evatt spoke strongly in favour of South Africa's record:

> South Africa was one of the few nations that from the beginning stood firm against aggression. So let those who are so ready to pass judgement upon others take all this into account.... I pay tribute to Mr Lawrence and General Smuts for the magnificent war job of the Union of South Africa. I do not like their being pilloried here. Nor do I like to enter upon a comparison of the conditions in South Africa as far as freedom and practice of democracy.[44]

That Australia took such a strong stand in support of the General Assembly's competency seems referable to Evatt's personal views rather than those of his bureaucratic advisers. Indeed, there is significant evidence that Evatt's advisers tended towards a more conservative view of the General Assembly's powers. Evatt was encouraged by Terence Glasheen, a Department of External Affairs officer, to rely on the Peace Treaties to establish the General Assembly's jurisdiction. Evatt declined to do so on the basis that the Peace Treaties lacked an appropriate remedies clause and that therefore the General Assembly was a preferable forum for discussion and action.[45] The Attorney-General's Department took a cautious approach to the 'domestic jurisdiction' question. In an unsigned memorandum bearing the style of Kenneth Bailey, for instance, the view was stated that the issues raised in the Indian complaints against South Africa were taken outside the scope of Article 2(7) only by the existence of the international agreements concerning the treatment of Indians such as the Capetown Agreement of 1927 and of the statement of 1932.[46] This approach was inconsistent with Evatt's approach to Hungary and Bulgaria.

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43 *Ibid.*

44 Speech by Evatt in Committee Four – Trusteeship, 8 October 1947, in NAA A 1068, Item P1 47/5/3/1; quoted by K Buckley, B Dale, W Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar*, Longman Cheshire, Melbourne, 1994, 307.

45 see Note by TG Glasheen on Violation of Fundamental Human Rights by Satellite States, 17/3/49, in NAA A 1838/283, Item 852/10/18 Pt 1, and Cablegram from Australian Embassy, Washington to Evatt, 16/3/49, in NAA A 1838/283, Item 852/10/18 Pt 1. As to Evatt's response, see Cablegram from DEA to Australian High Commissioner's Office, London, 17/3/49, in NAA A 1838/283, Item 852/10/18 Pt 1. The exchange was re-run in substantially similar terms in August and September, 1949: See, TG Glasheen, Memorandum to Minister, 5/9/49, in NAA A 1838/283, Item 852/10/18 Pt 4; and Cablegram from DEA to Australian Delegation to UN, 15/9/49, in NAA A 1838/1, Item 852/10/18 Pt 6.

46 Attorney-General's Department Memorandum on Article 2(7), 2/8/46, in NAA A 1067/1, Item M46/21/7 Pt 1.

On at least one occasion, the Australian delegation acted in accordance with a view closer to that of Bailey and Glasheen than Evatt. John Hood, as Australian delegate, reported to the Department in 1949 that he had been approached by a United States non-government organisation seeking to have the *Ingram* case[47] reviewed by the United Nations. Without seeking instructions on the matter, Hood declined any assistance on the ground that the United Nations had no capacity to deal with the matter until the Covenant was finalised and an implementing body established.[48] Even when the Cardinal Mindszenty trial was offered as a precedent for action, Hood responded that an individual human rights complaint was distinguishable from a violation that represented also a breach of treaty.[49] Hood thus noted with satisfaction that the non-government organisation would be in no doubt that Australia would be unlikely to support action in the General Assembly.[50] Hood's response was clearly at variance with the approach authorised by Evatt. It, together with the correspondence of Glasheen and Bailey, shows a significant fracturing of opinion as between the bureaucratic and political levels.

Looking at the Evatt period overall, however, Australian policy was marked by an acceptance of the General Assembly's power to discuss and make recommendations concerning the human rights practices of individual States, even of non-United Nations member States. This competency was not based on the international community's drafting of the UDHR or attempts to draft a binding Covenant, but was seen as referable to the original conception of the United Nations in Articles 10, 55 and 56 of the United Nations Charter. Although awareness of the controversy surrounding Article 2(7) and political sensitivities influenced the extent to which Australia supported the General Assembly taking action, Australia was adamant that there was no bar to the General Assembly taking action should a majority of parties request such action. Rather than being a consensus view of all Australians involved in policy-making at the time,

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47 According to the material left by the NGO, the Ingram case concerned the alleged mistrial of an African American.

48 Letter from Australian Mission to the United Nations to DEA, 16/8/49, in NAA A 1838/1, Item 856/13 Pt 5.

49 *Ibid.*

50 *Ibid.*

Australia's position seems to have been shaped primarily by Evatt's view of the proper relationship between international society and individual States. The influence of Evatt's views, however, was short-lived. During later periods of policy development successive Australian policy-makers reflected a startlingly different approach.

II. Spender Period

When Spender came to office in late 1949 Australia's public stance on Article 2(7) underwent a dramatic change. Human rights were *ipso facto* a matter of 'domestic jurisdiction'. Article 2(7) was seen as a bar to all United Nations action in the field of individual countries' human rights practices subject to that State giving consent or States having entered into a treaty that removed the topic from domestic jurisdiction. Any action by the General Assembly in relation to the human rights practices of States, whether it be the inscription of an item on the General Assembly's agenda, discussion of the item or the making of recommendations, constituted prohibited 'interference'. Within the General Assembly this policy was most evident in Australian policy with respect to ongoing discussion of South Africa's treatment of its Indian population.

In 1950 Spender directed that Australia should regard the South African item on the General Assembly's agenda as governed by the 'domestic jurisdiction clause'. South Africa was to be supported in its resistance to any General Assembly action, though Australia was also to support informal efforts to 'get the countries together'.[51] Delegates were told to 'lend whatever support we can to South Africa (on the issue of Indians in South Africa), as he (Minister) regards the question of domestic jurisdiction as being of overriding importance' regardless of the merits or demerits of the South African policies towards the Indians.[52] The Australian representative, Keith Officer, maintained this public line, but was forthright privately in his estimation that Australia would not be generally supported in its stance on Article 2(7):

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51 Quoted in Department of External Affairs Memorandum concerning Australian policy to date on South Africa, 30/8/50, in NAA A1838/283; Item 201/2/5/2 Pt 2.

52 Quoted in memorandum to the Secretary, DEA, 14/11/50, in NAA A 1838/283, Item 201/2/5/2 Pt 2. Bracketed material in the original.

> There is little open support for our views on domestic jurisdiction the prevailing attitude being that the Assembly has acquiesced three times already in a discussion on the subject.[53]

Australia also reconsidered its support for referring the issue of the General Assembly's jurisdiction over South African racial policies to the International Court of Justice. In late 1950, the Department of External Affairs sent a telegram to the Australian Mission stating

> Recent statements of Australian policy have stressed need for strict adherence to Article 2(7) and this must be kept in mind in considering out[sic] attitude towards a reference to the Court. If it could be assumed that the Court would give an extensive interpretation to domestic jurisdiction it might be advantageous to obtain an advisory opinion and to support a United Kingdom resolution, particularly if acceptable to South Africa. However, as it is difficult to anticipate what attitude the Court might adopt, we feel you should endeavour to avoid taking up a position on reference to the Court until we are in a position to discuss the question with the Minister.[54]

When consulted, Spender was not confident in the outcome of international litigation. The delegation were thus informed of Spender's view that:

> it is not in Australian interest for us to facilitate any reference to the Court which might result in a rigid definition of the scope of 'domestic jurisdiction' which we might be unable to accept.[55]

The Spender period was thus noteworthy for its introduction of a narrow formalistic approach to Article 2(7) and the powers of the General Assembly. There is little evidence of any dissent to this approach by bureaucrats, a fact that is not surprising given the extent to which Spender's views accorded with many senior bureaucrats who had served during the Evatt period. Yet it was Spender who was the main player in determining Australia's shift away from supporting General Assembly action in scrutinising the human rights record of individual countries. To a large extent Spender's resistance appears to have been linked to his wariness concerning the political nature of the United Nations, discussed previously in Chapter 6. His solution, however, was not to seek General Assembly endorsement of 'non-political' inquiries into abuses such as the appointment of a neutral Rapporteur. Instead his response was to completely reject the General Assembly's powers. His response thus revealed a fundamentally different approach to the desirable relationship between the United

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53 Cablegram from FK Officer to AS Watt, 15/11/50, in NAA A 1838/283; Item 201/2/5/2 Pt 2.

54 Cablegram from DEA to Australian delegation to UN, 15/11/50, in NAA A 1838/1; Item 201/2/5/2 Pt 1.

55 Cablegram for FK Officer from AS Watt, 16/11/50 in NAA A 1838/283; Item 201/2/5/2 Pt 2.

Nations and the individual State than that adopted by Evatt. For Spender, the rules of engagement had been previously set by the Charter in favour of State discretion over matters of human rights. Such a balance of interests could only be overturned through the consensual acts of States.

III. Casey and Bureaucratic Period

For most of the Casey period (1951-9) Australia's position remained unchanged. Despite some internal questioning of the policy in the early years, the conservative legalism of the major players, a distrust of the United Nations and Australia's growing sense of vulnerability to international attack reinforced Australia's devotion to an 'exclusionary reading' of Article 2(7). In the years 1959-1961 Australia reluctantly surrendered its opposition to General Assembly action with respect to South African apartheid policies in an attempt to avoid becoming internationally isolated and stigmatised. Despite this shift, however, Australia's fundamental policy of principled resistance to discussion of individual human rights matters and championing of Article 2(7) was retained. Given the prominence of the South African race-related items internationally, the following discussion looks first to Australia's policies in this area before looking at Australian policy more generally.

South African Race Related Items

In the initial years of the Casey ministry (1951-2) it appeared likely that Australia would lessen its Article 2(7)-based objections to General Assembly Resolutions directed at South Africa's treatment of its Indian population. Within the Department of External Affairs there was some questioning of the propriety and utility of Australia's stance. In 1951 an Assistant Secretary of the Department of External Affairs concluded that it was difficult to advise whether Australia should vote against or merely abstain on motions concerning South Africa's treatment of its Indian population.[56] While aware of the sensitivities concerning unjustified intervention in domestic policies in Australia

[56] Memorandum from Assistant Secretary, United Nations Section, to the Secretary, DEA, 29/12/51 in NAA A 1838/283; Item 201/2/5/2 Pt 2.

such as immigration policies, the Assistant Secretary considered the domestic jurisdiction argument to be weak in the particular case of South Africa and the treatment of Indians given the involvement of international agreements. He thus concluded:

> International jurists are not by any means unanimous on this question but the better opinion seems to be hardening against denying competence to the United Nations where international agreements have removed a matter from purely domestic concern; NZ and UK will be abstaining.[57]

In the Sixth Session of the General Assembly, the delegation was ordered not to refer to the domestic jurisdiction argument unless compelled to do so.[58] The South African withdrawal from the General Assembly discussions in the Sixth Session was perceived as leaving Australia in an embarrassing situation.[59] In the lead-up to the Seventh Session Casey approved an approach being made to the South Africans to explain and clarify the Australian intention to abstain rather than oppose Resolutions. South Africa was to be informed that Australia's interests in South and South East Asia 'now oblige us to take a less positive attitude, and that while we will not support United Nations "intervention", we may refrain from participating in both discussion and voting.'[60] By the Seventh Session of the General Assembly, the delegation was ordered not to take an active part in the discussion, accepting that since the item had been discussed by six Assembly sessions with overwhelming majority support, there was *de facto* recognition of United Nations competence.[61] Had it not been for the listing of the apartheid matter and the influence of Percy Spender and Kenneth Bailey, it is possible that Australia would have henceforth adopted a low-key approach of abstaining in relation to all human rights agenda items in the General Assembly.

The listing of apartheid as a separate item on the General Assembly's agenda in 1952 provoked renewed concern about General Assembly action. In September 1952 the Solicitor-General, Kenneth Bailey, together with the major human rights adviser in Attorney-General's Department, Leslie Lyons, met with the legal adviser to the

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57 *Ibid.*

58 Brief for the Australian Delegation to the Sixth Session of the General Assembly, Item 25, in NAA A 1838/283; Item 201/2/5/2 Pt 2.

59 Brief for the Australian Delegation to the Seventh Session of the General Assembly, Item 22, in NAA A 1838/283, Item 852/20/2.

60 *Ibid.*

61 *Ibid.*

Department of External Affairs, Dr Anstey Wynes, to discuss the proper interpretation of Article 2(7). Kenneth Bailey expressed the view that Article 2(7) was paramount over all other clauses of the United Nations Charter, and that the historic intention of Article 2(7) had been to prevent discussion of any internal matters including human rights.[62] According to Bailey, Article 55 was not inconsistent with Article 2(7) – it merely permitted the General Assembly to take general action in the human rights field, such as its establishment of the Commission on Human Rights. Dr Wynes was not persuaded. He considered that Article 55 and 56 demonstrated an intention to permit the General Assembly to discuss and make non-binding recommendations in relation to specific human rights matters.[63] Ultimately, however, it was Kenneth Bailey's view of Article 2(7) that won the day. The delegation was directed to fight strongly against the listing and discussion of apartheid and to oppose or abstain if isolated on further General Assembly action on the treatment of Indians in South Africa.[64]

The themes incorporated in the Australian delegates' directions on the Indian item were to be echoed in Australian speeches throughout the 1952-1959 period. The supplementary section to the Brief for the Seventh Session of the General Assembly reminded the delegation of the competency limits of the General Assembly, and also warned of the dangerous precedent value for discussions of race related issues:

> Australia has opposed such infringements in the past and the Indian complaint affords no good ground for changing this policy. Moreover, if the Indian complaint be accepted, it will establish an unfavourable precedent for future enquiries into other countries' domestic affairs, for example, Australia's treatment of aborigines.[65]

The Brief also questioned the utility of General Assembly action. Rather than persuading South Africa to change its policies, General Assembly action could be expected to aggravate racial conflict.[66] There was also fear expressed that India might

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62 Memorandum by Dr WA Wynes on Article 2(7) of the Charter of the United Nations, 29/9/52, in NAA A 1838/2, Item 852/10/2/1 TEMP. Note, too that Arthur Tange, the then Assistant Secretary of the Department of External Affairs questioned this interpretation of history – considering that Australia's support for the full employment pledge indicated support for international involvement in such matters.

63 *Ibid.*

64 See Brief for the Australian Delegation to the Eighth Session of the General Assembly, in NAA A 1838/283, Item 852/10/2/3 Pt 3.

65 Brief for the Australian Delegation to the Seventh Session of the General Assembly, Supplementary Item, in NAA A 1838/283, Item 852/10/2/3 Pt 1.

66 *Ibid.*

be encouraged by success in the General Assembly to exert further influence in African affairs.[67] The Seventh Session Brief permitted the delegation to abstain should it find itself isolated.[68] Indeed, in the years up to 1961 Australia more commonly abstained on Resolutions than opposed them. It was not until 1961 that Australia spoke again at length on the Indian item. By this time, the politicisation of apartheid had occurred to such an extent to make Australia unwilling to make the high political price for continued support for South Africa.[69]

In contrast to its dealings on the Indian item, Australia showed no inclination to adopt the neutral stance of abstaining in the early years of responding to the General Assembly's listing of the apartheid item. When the issue was first raised in the Seventh Session of the General Assembly in 1952 Australia responded with a vehemence similar to that employed in the Spender period. Australia argued that South Africa's treatment of its own people was a matter essentially within the domestic jurisdiction of South African and thus outside the proper realm of the General Assembly. Notwithstanding strong support from the United States for the General Assembly to take on such a role,[70] Australian delegates branded the action as 'indefensible'.[71] When the issue was referred to an Ad Hoc Political Committee in 1952, Patrick Shaw, as Australia's representative in that Committee rejected claims that Australia was being narrowly legalistic for reasons of self-interest:

> We are on a slippery path if we speak vaguely of the 'ever-expanding competence' of the United Nations without defining what we mean. What some people mean is to disregard the Charter whenever they think it expedient, so to do...The words 'nothing contained in this Charter' mean what they say, and it is difficult to see how provisions such as those of Article 55 and 56 can be held to create overriding obligations....[72]

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67 *Ibid.*

68 *Ibid.*

69 Australia changed to voting in favour of condemnatory Resolutions in 1961; in relation to the South African-Indian item, see Submission to the Minister for External Affairs, 11/4/61, in NAA A 1838/2, Item 852/10/2/3 Pt 10.

70 Cablegram from Australian Mission to the UN to DEA, 8/11/52, in NAA A 1838/283, Item 201/2/5/2 Pt 2.

71 *Ibid.*

72 Statement by the Australian Delegate in the Ad Hoc Political Committee, Mr Patrick Shaw, 14 November 1952 in NAA A 1838/283, Item 852/10/2/3 Pt 1; a summary record is in UN Doc AC.61/SR 16, 83; 14 November 1952.

Shaw steadfastly refused to comment on the South African legislation. He suggested that since each country had its own political and moral philosophy, its own economic and social history and consequently its own laws and customs, it could not be expected that all States would approve each other's laws.[73] The point was not the merits or demerits of a State's laws, but whether such domestic laws came within the competence of the United Nations. The Australian view was that they did not. Furthermore, Shaw rejected the view that discussion could be considered non-intervention and thus permissible under Article 2(7):

> As we see it, the word 'intervene' in Article 2(7) means what it says. Its simple Latin derivation means 'to come between'. It has been claimed here that mere discussion or perhaps even the passage of a resolution does not constitute intervention. I think that we need only cast our minds back over the progress of this debate so far to see that discussion in itself is intervention.

Shaw finished his speech with gloomy predictions for the history of the United Nations if it persisted with such intervention: 'we are convinced that in the end we may destroy and not consolidate the institution to which we are all committed'.[74]

In each subsequent session of the General Assembly up until 1959, Australian delegates affirmed the illegitimacy of United Nations action in the field. In 1953, for instance, Australians characterised Article 2(7) as having a dual nature. Not only was it designed as a prohibition on United Nations action, but it encompassed also an obligation on States to respect the domestic jurisdiction of other States. Instead of leading to productive change, passing further Resolutions would prove 'abortive' and would lower the prestige of the United Nations. Supporting an internally-driven, rather than externally-driven, model of change, the Australian delegate proclaimed in 1953:

> is it [the United Nations] to recommend measures to force a change in the psychological and moral attitude of the people of South Africa? Even those powers who have held for a period supreme sovereign power over other peoples have not been able to effect this...it seems to use that in accordance with fundamental democratic principles the impetus for such a change must come from within...[75]

In challenging the legitimacy of the United Nations Commission on the Racial Situation in the Union of South Africa in 1955, a distinction was drawn between the objectives of the United Nations and obligations of member States. While the United Nations was

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73 *Ibid.*

74 *Ibid.*

75 1953 statement on South African apartheid policies, in NAA A 1838/283, Item 852/10/2/3 Pt 3.

obliged to promote human rights, member States were bound to respect the internal authority of other States.[76] It was not until 1955 that Australian delegates incorporated an appeal to the self-interest of other States in their speeches. Unconstitutional action, such as that undertaken by the special Commission, was said to carry its own evils, setting a precedent 'dangerous to those who endorsed it'.[77] Unswayed by the fact that it was continuously outvoted, Australia portrayed itself as standing up for principle and minimised the significance of the majority opinion on the basis that 'repetition of an error did not make it a truth.'[78] It was not until 1959 that there was any softening of this line.

Recalling the discussions between Kenneth Bailey, Solicitor-General, and Dr Wynes, the Legal Adviser to the Department of External Affairs, it would appear that Australian hard-line attitudes on Article 2(7) were based on a *bona fide* belief that Australia's stance was in conformity with the proper interpretation of the United Nations Charter. Sir Percy Spender, who by this period was Australia's Ambassador to the United States and involved in some representational work at the United Nations, was also an adherent of an 'exclusionary' reading of Article 2(7).[79] In a climate in which Menzies and successive External Affairs Ministers decried the United Nations' tendency to usurp the role of States, particularly in criticising administering powers, it is not surprising that the official policy was to continue to push for restrictive interpretations of General Assembly power. From the Briefs for various delegations, it would also appear that Australia was feeling increasingly vulnerable concerning the precedent value of permitting the General Assembly to evaluate and condemn South Africa's apartheid policies. Specifically, mention was made of Australia's vulnerability concerning its Aboriginal policies. The obstructionist policies of 1951-1959 thus bear the hallmarks of

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76 UN Doc A/AC.80/SR 11, 38-39; 7 November 1955.

77 *Ibid.*

78 TW Cutts, Australian representative, A/SPC/SR 94, 43; 21 October 1958.

79 His influence can be seen in relation to discussion of the Tunisian matter discussed later in this Chapter.

the conservative legalism and State interest that determined Australia's response to self-determination in the mid-1950s.[80]

1959 was a watershed year. It was the year in which Australian delegations began abstaining rather than voting against Resolutions concerning South African apartheid policies. Political expediency rather than principle prompted the move. In an internal memorandum prepared for the Minister for External Affairs, Department of External Affairs' officials expressed resentment at the pronounced tendency amongst communist powers to engage in 'a complete travesty of the truth' whereby Australia's refusal to support General Assembly action was interpreted as sympathy for the policies of South Africa.[81] The memorandum went on to point out the risks to Australia's foreign relations should Australia persist in its continued opposition. Seven Commonwealth countries including Canada and New Zealand were by 1959 voting for the adoption of moderate Resolutions. Australia was laying itself open to attacks that it had something to conceal and that alignment with South Africa on a racial issue stimulated the belief that Australia was guided by racial considerations like the White Australia policy. To alter Australia's vote to abstaining would permit it to maintain that it was not putting expediency before principle and avoid prejudicing its relations with its Asian neighbours.[82]

Notwithstanding the United Kingdom's urgings that Australia remain steadfastly against General Assembly action,[83] Garfield Barwick, as Acting Minister for External Affairs, agreed to a change of vote. The only proviso was that Australian delegates record the retention of Australia's views on the General Assembly's lack of competence.[84] On his return, Casey endorsed the change of position.[85] The delegate in

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80 See Chapter 3.

81 Quoted in Memorandum by RL Harry, 'The Australian Vote on Apartheid', prepared for Senator Gorton, 11/4/61; in NAA A 1838/2, Item 852/10/2/3 Pt 10.

82 Memorandum from DJ Munro to the Secretary, DEA, 26/10/59, in NAA A 1838/283; Item 852/10/2/3 Pt 6.

83 Record of Conversation with Mr N Pritchard, Acting High Commission for the United Kingdom, unsigned, 6/11/59, in NAA A 1838/283; Item 852/10/2/3 Pt 6.

84 Cablegram from AH Tange to J Plimsoll, 3/11/59, in NAA A 1838/283, Item 852/10/2/3 Pt 6.

1959 thus abstained on the adoption of a condemnatory Resolution, explaining that Australia wished to make clear its lack of support for apartheid.[86]

Australia's political leaders were certainly not willing to surrender all objections to General Assembly action in relation to individual human rights matters. Prime Minister Menzies upheld the principle of non-interference in both the General Assembly, and in relation to other collective association of States, such as the Commonwealth.[87] When challenged in the House of Representatives on his stance on South Africa, Menzies was forthright in outlining the matters of principle and State self-interest at stake:

> To ignore this principle of non-interference would be to make domestic policies matters of international jurisdiction. That, I venture to say, would do much to create hostilities in the international atmosphere far greater than those which now exist [after referring to native populations and Australia's responsibilities]...If we are too free in asserting that what happens in South Africa is a matter for international jurisdiction, we may well step out of the light into the darkness on this matter. We may well find that, the door having been opened in that way, somebody will be willing to assert, at some time or other, in some circumstances, that we, in relation either to our own internal population or to the population of our territories, are also subject to international condemnation and international jurisdiction.[88]

When a Labor Member of Parliament interjected with the comment 'And so we should be!', Menzies attempted to highlight the hypocrisy of Labor which had not sought United Nations scrutiny of other human rights abuses:

> I did not hear a word from the honourable member for Sydney when men, women and children were shot down in their homes by the Mau Mau....My advice, and the advice of the Government of this country, is that, whilst nobody need restrain his individual indignation or feelings, we, as the government, should be careful not to abandon firm international ground in order to secure the advantage of some temporary feeling on this matter. We have our future to consider. We have also the whole of the relations between Commonwealth countries to consider....[89]

Such statements by Menzies indicated his firm ongoing commitment to Article 2(7) and the principle of non-intervention in domestic matters.

In 1961 a dramatic unexpected shift occurred. Australia announced that it would no longer object to the General Assembly's power to pass Resolutions condemning

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85 Cablegram from Australian Mission to the UN to DEA, 5/11/59, in NAA A 1838/283, Item 852/10/2/3 Pt 6.

86 A press conference was also held to explain the change of vote: see: Extract from Prime Ministers' Press Conference, 13 November 1959, in NAA A 1838/283; Item 852/10/2/3 Pt 6.

87 As to Menzies' attempts to prevent Commonwealth consideration of South African policies, see: RG Menzies, *Afternoon Light: Some Memories of Men and Events*, Penguin Books, Melbourne, 1969, 189-201.

88 Excerpt of Menzies response to a question from F Chaney MP, 29/3/60 in NAA A 1838/2, Item 852/10/2/1 TEMP.

89 Interjection was made by Eddie Ward MP, see Excerpt: *ibid.*

apartheid and moved to support elements of the Resolutions then being proposed. Given the timing of the Australian announcement, in the year following following the Sharpeville massacre in which some 69 persons were killed and a further 180 wounded at a protest concerning South African apartheid laws,[90] it might have been assumed that abhorrence of the brutalities of the apartheid regime led to an Australian overhaul of its Article 2(7) policy. Later internal documents certainly give this impression in relating Australia's change of vote to such a consensus from the British, American and Australian governments.[91] An examination of the flurry of documents surrounding the change of vote, however, undermines this causal theory

The Sharpeville massacre mobilised anti-apartheid sentiment internationally. It led, for instance, to the Security Council passing a Resolution condemning South Africa's actions.[92] Yet Prime Minister Menzies and Garfield Barwick (then Acting Minister for External Affairs) appear to have been unmoved. Both Menzies and Barwick refused to support a Resolution in the House of Representatives condemning South Africa. In April 1960, Barwick stated that Australia was not in a position to know the full facts of the incident and defended his stance that it was 'not Australian "to put the boot in" in such circumstances. [93] Arthur Tange, who had become Secretary of the Department of External Affairs in 1954, also noted Barwick's position on Sharpeville. In a memorandum outlining Australia's historic position on apartheid, a Department of External Affairs official had stated that the Australian government was 'appalled by the bloodshed and loss of life at Sharpeville and elsewhere'. Tange scribbled next to this

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90 See P Calvocoressi, *South Africa and World Opinion*, Institute of Race Relations, London, 1961. The Sharpeville massacre occurred on 21 March 1960. Following Sharpeville, a state of emergency was declared in South Africa and some 1700 persons were detained.

91 Covering Minute on Submission to Cabinet, Cabinet Minute 10/9/63, in NAA A 4940/1, Item C 3298.

92 The Security Council concluded in the wake of Sharpeville that there was sufficient international friction such that a threat to international peace and security might emerge: SC Resolution S/4300, quoted in JES Fawcett, *op cit*, 295.

93 Garfield Barwick as Acting Minister for External Affairs, 29/4/60, Press Release in NAA A 1838/283, Item 852/10/2/3 Pt 7.

statement 'the Minister does not so regard the events at Sharpeville'.[94] Instead, the primary catalyst for change was the United Kingdom's about-face on the issue.

On 5 April 1961, the United Kingdom expressed their departure from their previous voting in the General Assembly in the following terms:

> Apartheid confronts us with circumstances which are so far as I know unique in the annals of this organisation. We see the deliberate adoption, retention and development of a policy specifically based on total racial discrimination. This is further distinguished by the circumstance that it is discrimination amongst and against the permanent inhabitants of the country itself. Such a policy which is a deliberate exaltation of discriminatory principles, stands alone in its category.
> While the importance we attach to the proper observance of Article 2(7) of the Charter remains undiminished, we regard the case of apartheid in the circumstances which now exist as of such an extraordinary and exceptional nature as to warrant our regarding it and treating it as sui generis.[95]

The Australian delegation was shocked by the United Kingdom's statement and complained about a lack of consultation on the matter.[96] Prime Minister Menzies, who had fought against discussion of the topic (and expulsion of South Africa) within meetings of the Commonwealth,[97] implored his United Kingdom counterpart to reconsider and to abstain at least on the paragraphs of the Resolutions concerning sanctions and the threat posed by apartheid to international peace and security. In a cablegram to Prime Minister Harold McMillan, Menzies pleaded:

> I want you to realise that if the United Kingdom now vote in favour, with New Zealand presumably following suit, it would leave Australia quite isolated. This would render my own position intolerable. We, for our part, shall certainly abstain because to vote in favour would undermine and negate the attitude I have taken in London and here since the Prime Ministers' Conference. I hope I shall not be impaled on the horns of such a dilemna. [98]

When the United Kingdom could not be persuaded to change its stance, Prime Minister Menzies took the issue to Cabinet. Faced with the risk of being the only country not to vote for adoption of a Resolution, and the potential for Australia's position to be misrepresented, Cabinet authorised Australian delegates to vote in favour of General Assembly action. In terms of the specific Resolutions then before the General

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94 Notation of Arthur Tange on Memorandum prepared by RL Harry, 'The Australian Vote on Apartheid in the UN General Assembly' for Senator Gorton, covering note dated 11 April 1961, in NAA A 1838/2, Item 852/10/2/3 Pt 10.

95 Excerpted in NAA A 1838/2, Item 852/10/2/3 Pt 10.

96 Cablegram from Australian High Commission, London, to the Secretary, DEA, 5/4/61, in NAA A 1838/269, Item TS 852/10/2/3.

97 See fn 87 above.

98 Cablegram RG Menzies to H McMillan, 5/4/61, in NAA A 1838/269, Item TS 852/10/2/3

Assembly, Cabinet directed that Australia could support the African Resolution[99] provided that it abstained on the paragraphs concerning the imposition of sanctions and the existence of a threat to peace and security. The delegation was also to seek to maintain Australia's general position on Article 2(7).[100]

The qualified nature of Australia's position was reflected in the manner in which it announced its change of position. James Plimsoll, the Australian representative, spoke briefly. He indicated that Australia affirmed the sentiments expressed by the United Kingdom and that apartheid should be dealt with as a *sui generis* matter. It was only at a later date that Australia could extol the virtues of General Assembly action:

> With the exception of some extreme statements which would do more harm than good, the records of the debate in the UN would undoubtedly strengthen the growing moral, intellectual, political and religious pressure upon the Government of South Africa, which no Government could forever withstand.[101]

Even then, Australia did not convert to accepting expansive General Assembly action. Cabinet repeatedly affirmed that Australia was not to support sanctions[102] nor would Australia accept that apartheid gave rise to any threat to the peace.[103] Australia was frequently hesitant in supporting any General Assembly condemnatory Resolutions. Thus Australia at first refused to support Resolutions condemning the Rivonia trials of the African National Congress activists, including Nelson Mandela and Walter Sisulu, on the basis that not sufficient facts were known about the trials.[104] Similarly in 1966, when the General Assembly's item was phrased the 'Question of the Violation of Human Rights and Fundamental Freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial

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99 The 1961 General Assembly had before it two Resolutions. In the first, sponsored by 25 mainly African States, it was proposed that the General Assembly endorse a series of actions including breaking off diplomatic relations, closing ports to vessels flying the South African flag, and boycotting South African goods until such time as South Africa repealed the apartheid legislation. The second Resolution, put forward by India, Ceylon and Malaya, referred more generally to the need for collective action and for States to independently take appropriate reaction to precipitate South Africa's withdrawal of the apartheid regime: outlined in Covering Minute for Cabinet Submission, in NAA A 1838/269, Item TS 852/10/2/3.

100 Cabinet Minute, 7/4/61, Decision No 127, in NAA A 1838/269, Item TS 852/10/2/3.

101 AJ Eastman, Australian representative, UN Doc A/SPC 381, 108; 10 October 1963.

102 In addition to the Cabinet Decision 127, quoted in fn 94 above, Cabinet re-affirmed its opposition to sanctions in 1963 and 1964: see NAA A 1838/2, Item 916/1 Pt 23.

103 See Cabinet Minute, 7/4/61, Decision No 127 in NAA A 1838/269, Item TS 852/10/2/3.

104 AJ Eastman, Australian representative, UN Doc A/SPC 381, 22; 10 October 1963.

and other dependent countries and territories', RF Osborn, the Australian delegate, abstained on the draft Resolutions on the basis that they placed all colonial and dependent territories on the same footing and purported to mandate sanctions against South Africa.[105] For all this hesitancy, however, Australia was never to resurrect an Article 2(7) objection to discussions of South African racial policies.

Other Contexts

Apart from items dealing with South Africa's race-related policies, Australian policies reflect only minor fluctuations. Overall, the period witnessed an increasing attachment to an 'exclusionary' view of Article 2(7) and human rights. In 1952, when French policies in Tunisia were raised in the General Assembly, Casey sent through a cablegram to the Mission directing it to focus its response on Article 73 of the Charter (responsibilities of States in respect of non-self-governing territories) and emphasise the support of self-government ideals. He indicated some unease with raising Article 2(7) objections given Australia's previous stance on Indonesia[106] and Evatt's early position. Casey thus suggested that Article 2(7) be invoked only 'when we have to do so as we have yet to work out a detailed and consistent line on domestic jurisdiction.[107] In the United States Percy Spender obviously thought differently. Notwithstanding Casey's direction, Spender gave a strong speech against the inclusion of the Tunisian item, relying almost exclusively on Article 2(7). Not even the fact that the nature of Tunisia's relationship with France was dealt with in a treaty was sufficient to give the General Assembly jurisdiction over French policies in Tunisia since France retained sovereignty. Only after this speech did Spender receive backing from Casey to vote against the draft Resolutions concerning Tunisia on the basis of Australia's consistent opposition to discussing matters like apartheid or administered territories.[108]

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105 UN Doc A/SR 1389, 72; 10 October 1966.

106 Australia had previously supported United Nations involvement in the independence of Indonesia.

107 Cablegram from the Minister for External Affairs to the Australian Mission, 8/12/52 quoted in Memorandum to the Secretary, DEA on Australian Statement on Tunisia at Seventh Session of the General Assembly, in NAA Australian Statement on Tunisia at 7th General Assembly, in NAA A 1838/2, Item 852/10/2/1 TEMP.

108 *Ibid.*

After 1952 Australia continued to take hardline attitudes in relation to Article 2(7). It thus opposed the General Assembly's discussion of the problems in Cyprus (1954-1958) and Algeria (1955-1958).[109] The cases in which it did condone discussion were limited to those demonstrably 'international'. Australia thus supported discussion of the Soviet invasion of Hungary in 1956[110] and the status of West Irian.[111] In the latter case, an international agreement governed what was termed 'Netherlands New Guinea', namely the Charter of Transfer of Sovereignty of December 1949.[112] There is some evidence of a certain war-weariness creeping in around the time Australia began abstaining on the South African apartheid Resolutions. At the 14th Session of the General Assembly in 1959, Australia did not object to the listing of an item related to the violations of human rights and destruction of culture occurring in Tibet. The Australian representative took a path of least resistance in stating that 'since the question has been brought before the General Assembly, we have to look at what has happened in Tibet'.[113] The reasoning may have been that China's invasion of Tibet in 1948-50 distinguished the situation from earlier cases such as Tunisia or Algeria. It may also indicate a temporary easing of Article 2(7) objections.

Even if the Tibet case represented a significant concession, it is evident that Australia's renunciation of Article 2(7)-based objections in the apartheid context did not lead to an across the board abandonment of such objections. In 1966, for instance, in providing information to the Australian delegation on the situation of Aboriginal Australians, the Department of External Affairs emphasised that no formal revision of Australia's attitude towards Article 2(7) had been undertaken. It thus concluded that the subject of Aboriginal policies would be regarded as *prima facie* one falling within the scope of

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109 Memorandum on Domestic Jurisdiction, undated, NAA A 1838/2, Item 852/10/2/1 TEMP.

110 *Ibid.*

111 *Ibid.* Note though that in the midst of the debates about West Irian, Sir Percy Spender for Australia, emphasised the point that the General Assembly could not give an interpretation of the UN Charter that had any 'legal validity', but did not propose that the Court be asked for an advisory opinion on Article 2(7): N Harper, D Sissons , *op cit*, 172-3.

112 Memorandum on Domestic Jurisdiction, undated in NAA A 1838/2, Item 852/10/2/1 TEMP.

113 Memorandum No 1262/59 from Australian Mission to the United Nations to the DEA, quoted in Memorandum concerning Domestic Jurisdiction in NAA A 1838/2, Item 852/10/2/1 TEMP.

Article 2(7).[114] Similarly, even when informed that the United Kingdom was thinking of revising its stance on domestic jurisdiction, the Australian authorities showed no inclination to follow suit.[115] By the end of the period, therefore, Australia had conceded ground on the issue of apartheid, but maintained an otherwise strong emphasis on the incompetence of the General Assembly to take action in relation to the human rights abuses committed in individual countries.

Furthermore, during this later period of policy development it is evident that Australian policy-makers did not believe that the finalising of the Covenants would alter the General Assembly's powers. In 1953, for example, the Brief for the Eighth Session of the Commission on Human Rights limited the significance of the draft Covenants to reducing the scope for domestic jurisdiction arguments to be raised in defence to actions taken under those Covenants:

> The approval of the covenant by Australia will have implications for Australian policy in regard to the domestic jurisdiction issue. There can be no doubt that the bringing into effect of the covenants through the necessary ratifications will extend the scope of international action. Any government accepting the covenants will find itself compelled to face the possibility of international discussion which previously, it could plead, was barred by the domestic jurisdction clause of the Charter.[116]

This statement was not a recognition that human rights would have become a matter of international concern generally, but that the Covenants might themselves authorise international discussion on a State's human rights record. The point was made more clearly in a letter from Prime Minister Menzies to the Reverend Beovich, the Archbishop of Adelaide. In declining the Archbishop's invitation for Australia to seek General Assembly action against religious intolerance in Czechoslovakia on the grounds of Article 2(7) of the Charter, the Prime Minister further noted:

> You will appreciate, however, that the Covenant when approved will only permit investigation of alleged breaches of human rights to be carried out in those cases in which the Government accused of a breach has ratified the Covenant, including the important implementation provisions which provide for hearing of complaints by a Human Rights Committee.[117]

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114 Memorandum from JD Petherbridge, for the Secretary, DEA to the Secretary, Department of Territories, 15/12/66, in NAA A 1838/1, Item 929/5/3 Pt 2.

115 Draft Letter from DEA to the Secretary, Prime Minister's Department concerning United Kingdom's proposal, circa August 1966, in NAA A 1838/1, Item 929/4/12.

116 Brief for the Australian Delegation to the Eighth Session of the Commission on Human Rights, in NAA A 432/20, Item 54/3779 Pt 7.

117 Letter from Prime Minister Menzies to Archbishop M Beovich, 15/8/51, in NAA A 1838/1, Item 929/1/2 Pt 1.

Similarly, in the notes prepared for the Australian delegation to the Conference of the Inter-Parliamentary Union in Bangkok of November 1956, the delegation was warned that a State's adherence to a human rights convention:

> need not necessarily mean that the rights are no longer essentially within the domestic jurisdiction of those States, in the sense of Article 2(7) of the Charter. Thus, it will be seen that the competence of the UN to deal with an individual violation of human rights, even when it is the subject of an international convention, may be open to doubt.[118]

Article 2(7) was thus seen as representing a continuing barrier to General Assembly action in relation to individual human rights practices.

Despite being consistently subject to a certain degree of manipulation to achieve foreign affairs objectives, it is evident that during the period of 1946-1966 Australian receptiveness to the General Assembly initiating debates and recommendations on the human rights practices of individual States varied enormously. Evatt's initial enthusiasm for encouraging the General Assembly to exercise such powers was replaced during the Spender and later periods by an insistence that Article 2(7) made any such General Assembly action illegitimate. Differing legal opinions, and sensitivity to potential United Nations criticism of Australia's race based policies combined to produce this movement. In light of these attitudes to General Assembly competency, one might have expected to see a similar pattern of resistance in Australia's policy towards the Commission on Human Rights' handling of individual petitions received during the negotiations of the International Bill of Rights. Interestingly, the reverse seems to have been the case.

B. Responses to the Commission on Human Rights' Receipt of Individual Petitions

Overview of the International Debate

Throughout the negotiations of the International Bill of Rights, the United Nations was inundated with individual human rights petitions. The Secretariat of the United Nations passed along such complaints to the Commission on Human Rights but did not resolve

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[118] Notes for the Australian delegation to the Conference of the Inter-Parliamentary Union in Bangkok of November 1956, in NAA A1838/1, Item 856/13 Pt 16.

what action the Commission on Human Rights was to take on such petitions.[119] In 1946 the Human Rights Division of the Secretariat sought advice from the Legal Department of the United Nations. The Legal Department advised that it would need to study all possible interpretations of Article 2(7) and so would not be able to provide a speedy, definitive view. John Humphrey, the inaugural Director of the Human Rights Division, then reached the view that the Commission did not have any power under the Charter to make a recommendation to the States in regard to the letters. In his view the 'facts and circumstances' described in the communications fell within the area of a State's 'domestic jurisdiction' and that even a recommendation might be considered improper intervention by the member State concerned.[120] Henri Laugier, the Assistant Secretary-General of the United Nations with responsibility for human rights matters determined that the communications should be disclosed to Commission members in the interim.[121]

At its First Session in 1947 the Commission on Human Rights discussed what action it should take in relation to the transferred communications. The Commission concluded that it did not have power to take any action, but requested the Economic and Social Council to confirm this view.[122] After consideration of the matter, the Economic and Social Council agreed the Commission had no power to evaluate the petitions, but devised a system of handling them. Under ECOSOC Resolutions 75(V) and 275(X),[123] the Secretary-General was to compile a confidential list of communications concerning human rights before each session, with a brief indication of each communication's substance. This list would be furnished to Commission members without divulging the identity of those making communications (unless specific permission had so been

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119 Although most letters of complaints were addressed to the United Nations or the Secretary-General, the letters were re-directed to the Commission on Human Rights.

120 Memorandum from JP Humphrey, Director, Division of Human Rights, to Henri Laugier, Assistant Secretary-General in charge of Social Affairs, 28/8/46, DAG 18/1.1.0 Box 4, United Nations Archives, New York .

121 Memorandum from H Laugier, Assistant Secretary-General, Social Affairs, to Secretary-General, 15/10/46, DAG 18/1.1.0, Box 4, United Nations Archives, New York.

122 E/CN.4/27, see too E/CN.4/64 – 14 December 1947.

123 The combined effect of the Resolutions is apparent in ECOSOC Resolution 275 (X), 17 February 1950, 10 ESCOR Supp 1 (1950).

granted). States were free to respond to the communications and have their responses published in summary or short form by the Commission on Human Rights.[124]

Few attempts were made by Commission on Human Rights members to increase the Commission's activity in relation to individual communications. At the Eighth Session of the Commission on Human Rights, India sponsored a draft Resolution requesting the Economic and Social Council to reconsider Resolution 75(V) so as to authorise the Commission to make reports and recommendations concerning 'serious cases' of violations of human rights. While receiving support from Egypt and Latin American States, a majority would only accept the suggestion that statistics concerning communications be included in Commission reports.[125] At the Eighth Session of the General Assembly, Egypt suggested that the Commission transmit to governments the serious allegations of violations and for such complaints and any responses received to be forwarded to ECOSOC. It was defeated 26 to 9 with 15 abstentions.[126] The final major attempt to increase the Commission's activities came in 1957 with the Greek proposal that the Commission be empowered to take 'interim measures' with respect to complaints of human rights abuses. The proposal was not accepted, with a majority of delegations of the view that it would be best to await the finalisation of the Covenants and their implementation mechanisms.

I. Evatt period

Unfortunately, there is very little documentation of the Australian policy concerning the Commission on Human Rights' handling of individual complaints during the Evatt period. Unlike other aspects of human rights implementation, there are no records of communication between Evatt and his advisers on this point. The surviving

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124 States were to indicate whether they wished their replies to be presented in summary form or in full: ECOSOC Resolution 192 A (VIII), 9 February 1949, 8 ESCOR Supp No 1 (1949).

125 Outlined in the Brief for the Australian Delegation to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/9 Pt 3. ECOSOC at its 14th Session resolved not to change the procedures for dealing with communications: *ibid.*

126 *Ibid.*

documentation was generated solely by the Australian Mission to the United Nations. It indicates that as Australian complaints began filtering into the Commission, Australian representatives affirmed the Commission's lack of capacity to deal with the merits of the cases without evincing particular defensiveness.

When the matter was before the Commission on Human Rights at its First Session, Australia does not appear to have entered into the debate. The only reference in the Report of the representative to the First Session of the Commission on Human Rights describes Australia's support for South Africa's proposal that the confidential list of communications be distributed to all members of the United Nations, rather than being limited to members of the Commission alone.[127] By 1947 the Commission had received two Australian communications.[128] Judging from the lack of documentation, however, the Australian delegates did not seek to elicit any response to the communications from interested Departments.[129] In public the Australian delegate stated without elaboration that the Commission had no authority to act as a world tribunal or a quasi-judicial authority.[130]

Given Evatt's active support for General Assembly action in relation to human rights complaints in relation to the human rights situation in Eastern Europe in the late 1940s, one might have expected the delegation to indicate support for the Commission (or another body of the United Nations) to take more initiative in acting on the communications. Australia's willingness to accept that no action be taken on the complaints seems traceable to three factors. First, the delegation appears to have been developing policy 'on the run', without seeking the views of Evatt. This may have led

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127 Report on First Session of Commission on Human Rights, in NAA A1838/278, Item 856/13 Pt 1. This proposal was defeated.

128 According to the report of the delegate, the first complaint involved the contact of whites with aboriginals on native reservations through the establishment of a rocket range. The second complaint alleged infringment of the right to work due to the operation of the Employment Bureau: *ibid.*

129 Cablegram from R Hodgson, Australian Delegation, Geneva to DEA, 5/10/47, in NAA A 1838/278, Item 856/13 Pt 1.

130 Report on Second Session of the Commission on Human Rights (Hodgson), in NAA A 1838/278, Item 856/13 Pt 2.

to the delegation being influenced by the more conservative approach to Article 2(7) limitations that enjoyed some currency in the bureaucracy (discussed in Part A of this Chapter). Secondly, even if the delegation had received instructions from Evatt, it is possible that his view of the Commission's power would have been quite distinct from his stance on the General Assembly's power. Whereas the General Assembly was given particular powers under the Charter to discuss matters within the United Nations' jurisdiction, the Commission was a subsidiary body of the Economic and Social Council and so required the delegation of specific functions from the Economic and Social Council. The Commission had not been mandated to perform any functions with respect to individual complaints. Thirdly, a distinction might be drawn between the topics Evatt raised in the General Assembly that related to systematic abuses and the specific claims of complainants to the Commission on Human Rights. Even in the case of Cardinal Mindszenty's trial, Australia raised more general claims concerning the administration of justice and freedom of religion in a broad range of situations. In the Spender period Australia's objections were more firmly interlinked with the domestic jurisdiction question.

II. Spender Period

The Spender period is most remarkable for the simplicity and consistency of the Australian approach. Australia rejected any competency of the Commission to evaluate complaints and similarly refused to respond to the communications publicised by the Commission. In a submission prepared in April 1951, the Department of External Affairs outlined the complaints that had been received by the Commission on Human Rights from Australians. Spender refused permission to the delegation to refer to such factual defences in the Commission on Human Rights. Spender's annotation to the paper read:

> These matters have nothing to do with the Commission and we should do what we can to prevent their discussion and if discussed record unequivocally that we will not have outside interference in our domestic affairs.[131]

[131] Memorandum from AH Tange, Assistant Secretary, DEA to Australian Representative to the HRC, 13/4/51, in NAA A 1838/1, Item 856/13/10/6 Pt 1.

At sessions of the Commission on Human Rights in 1950 and 1951 Australia thus remained silent and received the list of communications without comment. It was not until the Casey and Bureaucratic period that this silence was broken.

III. Casey and Bureaucratic Period

During the period May 1951-1966, Australia displayed a somewhat paradoxical approach to the issue of the Commission on Human Rights handling of petitions. On the one hand, there was a continuation of an official resistance to giving the Commission any powers to consider the detail of the communications. On the other hand, however, with the increasing bureaucratisation of the process of policy development came a greater receptiveness to providing the Commission with responses to complaints.

Australia was never amongst the ranks of supporters for increasing the Commission's activities with respect to the handling of communications. In relation to the Indian proposal that the Commission make reports and recommendations concerning 'serious cases' of human rights violations, Australia stated that the Commission was not in a position to contemplate action of this sort.[132] Similarly at the Eighth Session of the General Assembly, Australia voted against Egypt's proposal that communications and responses be brought to the attention of the Economic and Social Council.[133] Australia also opposed the Greek proposal that the Commission take interim measures in relation to human rights abuses on the basis that the Commission had no current power to take action and that the international community had to await the finalisation of the Covenants.[134]

Unlike the Spender period, however, Australia appeared willing to provide information to the Commission on Human Rights in response to the allegations. In files dealing

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132 Outlined in the Brief for the Australian Delegation to the 10th Session of the Commission on Human Rights, in NAA A 1838/1, Item 856/13/10/9 Pt 3.

133 *Ibid.*

134 See Cablegram from DEA to Australian Mission to the UN, NY, 1/2/57, in NAA A 518/1, Item 104/5/2 Pt 2.

with the Ninth Session of the Commission on Human Rights in 1953, there are copies of responses prepared by relevant departments, ready for submission to the United Nations. The 1954 Brief for the Commission on Human Rights contained full details of the Australian responses to two out of three individual communications. The absence of a response to the third communication was considered worthy of explanation. The delegation was informed that since the complaint related to the failure of the United Kingdom to grant an old age pension to a New Zealand citizen who had previously received a pension in Australia, the complaint was of only 'incidental interest' to Australia.

A fuller picture of Australian responsiveness to providing information in response to individual communications can be gained from an examination of the official records of the United Nations. The Geneva United Nations Archives have maintained the records relating to individual communications and responses received from 1956 onwards. In the 1956-1966 period, there were some 68 complaints concerning the behaviour of the Australian government.[135] Of these 68 complaints, some 25 appear to have elicited no response from the Australian government, judging from the absence of a response in either the Geneva files or the governmental files. In view of the degree of incompleteness of records in either Geneva or Australia,[136] allowance needs to be made for some margin of error. Notwithstanding this consideration, it is of interest that surviving records indicate a responsiveness level of 63%.

It is somewhat easier to document Australia's record of providing responses in a majority of cases than to indicate how this change of heart took place. The Australian government files examined by the author do not reveal any Ministerial direction from Casey on the point. In the absence of such a direction, the most likely explanation is

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135 The 68 complaints were identified from the six microfilmed files of complaints held in the Geneva United Nations Archives: SO 215/1 Austl., UN Archives, Geneva. All complaints received in the period 1956-1966 in the Geneva files. In some of the cases the responses were received in 1967.

136 The author's search of both sources revealed the existence of some complaints received by the United Nations that were not forwarded on to Australia, and some responses sent by Australia that are not reflected in the Geneva files. Similarly, Australia did not keep one file containing all communications and the responses.

that bureaucrats took the initiative in preparing and submitting Australian responses.[137] From Chapter 5, it may be recalled that Fred Whitlam was personally in favour of some form of individual petitioning for the Covenants (notwithstanding Casey and Spender's opposition), and the Department of External Affairs consistently argued in support of allowing non-government organisations to make petitions. Annotations of conversations between Departments indicate that the Department of External Affairs certainly encouraged the making of responses. In 1954, for instance, KCO (Mick) Shann was recorded as having told the Department of Territories that 'there is no legal obligation to answer the communication, but if there is a reasonable reply it is desirable to do so'.[138]

That bureaucrats left to their own devices were receptive to providing written responses to the United Nations is not surprising. Defending governmental action was and remains a standard part of a public servant's normal duties. Bureaucrats involved in the administration of Australian domestic policies would have a vested interest in defending Australia's record of due process and fairness in administering its policies. Once re-assured that the practice of the Commission on Human Rights was to accept and publicise responses from governments without engaging in any commentary, bureaucrats would perceive that submitting positive responses was an excellent means of defending Australia without incurring further international debate on the particular issues involved. From being shown Briefs for delegates, successive Ministers for External Affairs would be expected to have had some awareness that Australia was routinely providing responses. From the lack of any evident interference, it would appear that bureaucrats' political masters concurred in the view that submitting information was a way of spreading good news about Australia without incurring political risk.

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137 Whilst Ministers cleared briefs for delegations, the Australian responses to communications were often sent individually. The files examined did not reveal that they were 'cleared' through the Minister for External Affairs.

138 Annotations on Letter from KCO Shann, for the Assistant Secretary, DEA, to the Secretary, Department of Territories, 6/9/54, in NAA A 518/1, Item 104/5/4.

Such a strategy of using responses to complaints as a means of positive publicity and defence would also sit comfortably with an analysis of the nature of the complaints for which responses were not submitted. In the 1956-1966 period, the largest number of cases for which no response is evident in the Australian or United Nations files relate to issues of the greatest domestic sensitivity. Eight of the 28 complaints related to the treatment of Aboriginal people, and a further two related to inhabitants of trust territories. Some six complaints concerning the treatment of migrants also appear to have not elicited a response, in addition to two concerning the application of anti-communist policies in Australia. It is not possible to use these statistics to claim that there was a blanket rule against responding to complaints dealing with such issues. Amongst the 40 communications to which there are Australian responses on file, some deal with conditions in migrant hostels and the treatment of indigenous persons. However, a higher proportion of such cases appear in the 'no response evident' category. Thus, there was a more pronounced hesitance to provide responses in cases involving such sensitive cases. This hesitance is not surprising in an environment in which bureaucrats rather than political ministers were playing the lead role in decision-making. Being aware of the political price that might be paid for adverse publicity, bureaucrats would be unlikely to volunteer politically sensitive information or concessions. What is evident is thus a consistent selective responsiveness to the Commission on Human Rights with respect to individual human rights complaints.

Conclusion

Australia cannot be said to have supported a broad interpretation of United Nations' power in the field of human rights scrutiny throughout the period 1946-1966. Political alliances and sensitivities caused minor fluctuations in policy during each time period. However, notwithstanding these fluctuations, there was a distinct movement away from recognising any competency in the United Nations to deal with individual human rights violations, other than through the mechanisms drafted for the human rights Covenants. Rather than simply being a result of Cold War tensions, Australia's adoption of such obstructionist policies reflected distinct, narrow conceptions of the role of the

international community in intervening in human rights matters. Evatt adopted a broad view of the role for the international community (through the General Assembly) in responding to human rights violations occurring in individual States. Spender and Bailey took a much narrower view of the role of the United Nations, maintaining that human rights matters were a matter of 'domestic jurisdiction' under the United Nations Charter. Even when the international politicisation of racial issues prompted a reconsideration of Australia's stance on apartheid, Ministers and bureaucrats alike in the 1960s were reluctant to encourage General Assembly inquiries, their legal views being bolstered by their sense of vulnerability about Australian policies, particularly those concerning Aboriginal people.

The devolution of policy-making responsibility to the bureaucratic level in the 1950s and 1960s is also revealed as having a paradoxical effect. Even as Australia's insistence that the Commission on Human Rights did not have power to deal with individual human rights complaints crystallised, Australia increasingly provided information to the Commission in response to the complaints. This responsiveness was selective however. Bureaucrats viewed the provision of (positive) information as a means of deflecting international criticism from Australia rather than inviting any discussion of individual human rights issues. There was no pattern established likely to encourage fulsome participation in all inquiries of the United Nations into human rights violations in Australia.

CONCLUSION

In Louis Henkin's words, it took the international community eighteen years 'to accommodate, bridge, submerge and conceal' deep divisions between States in order to reach agreement on the twin human rights Covenants.[1] This thesis suggests that Australia's continuing support for the development of international human rights norms belied similarly deep divisions *within* the Australian State. Contrary to the impression created by existing analyses, support for an international human rights regime underpinned by a common 'human rights lexicon' was far from inevitable. Furthermore, the very nature of the resistances to many principles commonly assumed to be shared principles amongst human rights adherents highlights the likelihood of continuing divergence in Australian implementation of the International Bill of Rights.

The Chapters of this thesis have shown that a significant narrowing of approach towards international human rights occurred during the period 1946-1966. The period whose policies most approximate those promoted by most current human rights commentators was the Evatt period. During this period, Australia in general sought recognition of broad international human rights guarantees in relation to civil, political, economic and social rights. It embraced an active view of the State's role in implementing such rights. The enactment of legislation to cover both the private and public sectors was endorsed as a minimum standard. Federal action was viewed as desirable so as to provide for the uniform enjoyment of human rights. In this period, Australia also advanced ambitious proposals for the international community's involvement in scrutinising the human rights records of individual States, including the establishment of an International Court of Human Rights.

In the period 1949-1951, the Spender period, the conceptualisation of an ideal international human rights regime narrowed dramatically. Rights requiring government

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1 L Henkin, 'Introduction' in L Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, Columbia University Press, New York, 1981, 9-10.

intervention, whether they be civil, political, economic, social or cultural were criticised. The individual was looked to as the major agent of ensuring the realisation of most rights. The only exceptions were those traditional civil and political rights that restricted a government's powers to intervene in individuals' lives. Rights were regarded as being constrained by and dependent upon an individual's performance of his or her duties. Government action to guarantee rights was scorned. Federal legislative action was particularly stigmatised as upsetting the existing federal balance. In relation to international implementation, Australia moved away from expansive methods of international implementation, seeking to limit United Nations 'interference' in domestic matters. Suspicion was also directed towards the motives of those individuals and NGOs who would be eager to submit complaints in relation to Australia's performance.

In the earliest years of Casey's term in office as Minister for External Affairs, the policy instructions of the Spender period were endorsed with little change. Only Casey's direction that Australia avoid isolation served to soften some of the edges of Australia's policies. Yet the period 1952-1966 is remarkable for the shifting balance of power in policy-making. With the exception of intervention in relation to the most politically sensitive topics such as General Assembly action on race-related issues, the fulcrum of power shifted to the bureaucratic level. As bureaucrats like Fred Whitlam and Kenneth Bailey became more involved in decision making, Australian policy became even more linked to the support for 'traditional' common law human rights. The need for precise drafting of the Covenants was emphasised in order to separate out the imaginative rights of the UDHR from the legal rights to be included in the Covenants. A desire to insulate existing Australian policies became more pronounced, particularly in the civil and political rights field. Increased emphasis was placed on the limited, progressive nature of economic and social rights. International scrutiny was to be kept within tight boundaries. At the same time, the bureaucratisation of policy development led to an increased responsiveness to providing detailed defences of Australian governmental practice to the Commission on Human Rights.

Existing accounts of Australia's relationship with the international human rights regime have glossed over this process of change. As discussed in the Introduction, they have either failed to advert to any divisions within Australia or minimised the significance of variations by attributing the responsibility to the external, temporally limited Cold War. This thesis reveals that the Cold War is not a sufficient explanation for the variations in policies. Undoubtedly anti-communism did play a role in shaping Spender and Casey's view that permitting international discussion of individual human rights abuses might lead to the communist-inspired subversion of orderly government. Likewise Menzies' commitment to eradicating communism in Australia influenced Australian support for broad limitations clauses even to civil and political rights. Individual complainants in Australia were often written off as communist sympathisers. Yet Australia did not adopt a 'Western bloc' approach. During the Evatt period, Australia routinely promoted policies that were opposed by the United States and the United Kingdom. Even in the mid-1950s, when Cold War tensions were high internationally and bureaucrats were keen to avoid international isolation, Australia opposed the United States' initiatives on self-determination.

One needs to look closer to home for the explanations for these divergences. This thesis has suggested that three primary factors were at work in shaping the movements in policy. The first factor was party-political allegiances. The switch from a Labor government to a Liberal government in 1949 (and the continuation of Liberal administration from 1949 until the end of the period studied in this thesis) and the associated changes in the outlook between Evatt and Spender were pivotal in affecting Australia's relationship to human rights. Labor's commitment to socialism lent itself to active government involvement in all forms of rights and was also amenable to recognition of economic and social rights. The Liberal Party's aversion to socialism made government intervention appear unattractive and led to a questioning of freestanding economic and social rights, at least those relying on the State for their realization. Labor and Liberal also had fundamentally different approaches to

federalism, differences that were mirrored in Australia's earliest approaches to inclusion of a federal-state clause.

The second factor consistently identified in this thesis has been the personal political philosophies of policy-makers. This was evident, for instance, in Evatt's conceptualisation of government power being constrained by human rights. It was equally evident in the contrary conceptualisation of Spender and Whitlam that governments enjoyed a broad discretion in defining the scope of international human rights. Similarly, due to their acceptance of Diceyan-style ideals, both Whitlam and Bailey emphasised the importance of 'civil liberties' and supported reliance on the common law and parliamentary democracy as the best means of protecting human rights.

The third factor this thesis identified was the status of decision-makers - whether decision-makers were politicians or bureaucrats. During the Evatt and Spender periods, when Ministers were most active, Australian delegates were empowered to advance original proposals. In the Evatt period, for example, Australia submitted a statute for an International Court of Human Rights. In the Spender period, Whitlam was ordered to seek reference to the mutuality of rights and duties. By 1952, it was bureaucrats who carried the burden of decision making in general, the only exception being the sporadic re-engagement of Ministers in response to the international politicisation of race. In the bureaucratic period very few new initiatives were suggested and policy stagnated. Briefs were duplicated for at least six years (1955-1961) with little review. Competing Australian domestic laws and policies were outlined in Briefs with directions for the delegates to seek accommodating amendments or voice restrictive understandings of clauses. Such conservatism of approach is not surprising. Following previous directives and protecting all Australian policies so as to prevent political embarrassment was obviously an attractive option for public servants left without significant political guidance. Paradoxically, the bureaucratisation of policy development also appears to have produced a greater receptiveness to responding to individual petitions to the

United Nations. At least in cases where a positive response could be provided, bureaucrats were eager to promote Australia's record of efficient and just administration on the international plane.

This thesis has shown that at any particular time there were often several of these factors interacting to produce Australian policy. In Australia's increased resistance to civil and political rights involving government intervention, for instance, one sees the dovetailing of Spender's Liberal Party philosophy with Whitlam's Diceyan ideals. Similarly in Australia's change of vote on apartheid or the anti-discrimination clause, one sees bureaucratic concern over international pressure overlapping with political preparedness to take action. Identification of these three factors is not to deny the undoubted effect of international tensions. The Cold War as well as the politicisation of race and decolonisation had a profound impact in shaping Australian policies. Yet, this thesis has argued that ultimately, the three internal forces identified had the greatest impact overall in shaping the policies adopted.

This thesis has also highlighted that, notwithstanding these variations of policy, there were significant areas of continuity in Australian policies. At no point was there acceptance that the implementation regimes for all types of rights should be identical. Question marks always surrounded the international and domestic implementation of economic and social rights. Similarly Australia consistently resisted the recognition of rights or implementation mechanisms that threatened to impinge upon Australian immigration and race-related policies. Chapter 3 in particular highlighted the resistance to recognition of a right to self-determination and any special rights of minorities. Chapters 1-4 revealed the extent to which an Anglo-Celtic male model of the rights holder influenced Australian policies. Occasionally some of these areas of resistance appeared to be surrendered as Australia modified its voting pattern. Yet, frequently, though Australia was keen to avoid becoming internationally isolated, it was also capable of transforming its objections into narrow understandings of the disputed clauses. Examples of this tendency include the way in which Australian delegates

regarded the 'special measures' provision in CERD as covering 'protective' legislation for aboriginal people (discussed in Chapter 2) and the expressed understanding in internal documents that the progressive nature of economic and social rights excused existing discriminatory practices (discussed in Chapter 1).

In exploring the central areas of divergence and similarity, this thesis puts into perspective Australia's act of ratifying the ICCPR and ICESCR. At the simplest level, identification of the many areas of resistance in the latter period of policy development helps contextualise Australia's less than enthusiastic voting for the ICCPR and ICESCR.[2] Study of the later period of policy-development (the Casey and Bureaucratic period) also suggests plausible explanations for why Australia's ratification of the ICESCR and ICCPR was somewhat delayed, and in the case of the ICCPR, accompanied by significant reservations.[3]

The findings of this thesis would seem to have broader significance, though, in enriching our understanding of likely patterns in Australia's future implementation of its human rights obligations.

Some Reflections on the Potential Significance of Australia's Negotiating History

As stated in the Introduction to this thesis, this study was not undertaken in the belief that it is possible to predict an unaltered cycle for future Australian State behaviour. The significance of Australia's ratification of the finalised ICCPR and ICESCR brings into play additional factors. Post-ratification, States may reconsider their attitudes to

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2 In the final votes on the substantive articles of the ICCPR, Australia supported 17 provisions, abstained on 5 and opposed 2. In relation to the ICESCR, Australia supported 3 rights, abstained on 8 and rejected 2. The reasons for such votes are summarised in Memorandums by P Brazil on the ICCPR and ICESCR, 19/6/67, in NAA A 446/165, Item 1970/76776.

3 Australia originally entered reservations to Articles 2, 10, 14, 17, 19, 20, 25, and 50 and entered an 'understanding' concerning Australia's position as a federal state. On 6 November 1984, Australia withdrew its reservations to Articles 2, 50, 17, 19 and 25, and part of its reservations with respect to Article 10 and 14. For the text of the reservations, see UNTS, Vol 1197, 411; See too G Triggs, 'International legal notes: Australian reservations and declarations with respect to the ICCPR' (1981) 55 *Australian Law Journal* 699, 699-700.

international instruments and the clauses and seek to integrate into their understanding and practice, the understandings of clauses promulgated by international authoritative bodies such as the Human Rights Committee or Committee of Experts of the ICESCR or may embrace the understandings of clauses set out in 'standard texts'. One of the central tenets of international law is that States surrender subjective understandings of international law and agree to be governed by the objective textual meaning of treaty provisions, taken to by synonymous with the perceived common intention. Thus, where Australian decision-makers are conscious that Australia's interpretation of a particular clause of the International Bill of Rights is out of step with current international standing, practitioners of international law would expect Australia to jettison that understanding and embrace the 'objective' interpretation.

Yet, given the lack of any 'ultimately authoritative' body in the international human rights regime, it would seem likely as a matter of practice that future Australian State actors will be influenced, consciously or unconsciously, by the divergent values, assumptions and attitudes revealed in this thesis in interpreting their human rights obligations. A brief examination of the major cases in which Australia's human rights practices have been subject to critical examination by the United Nations to date suggests a high level of continuity between past and present attitudes towards international human rights.

The first case in which Australia faced an adverse finding from the Human Rights Committee was the *Toonen* case.[4] At issue in that case were the Tasmanian laws criminalising homosexuality. Toonen argued that the Tasmanian laws infringed his right to privacy as protected under Article 17 of the ICCPR. The Human Rights Committee agreed. A division occurred between the Commonwealth and Tasmanian state government. A Labor Party Commonwealth government did not seek to justify the Tasmanian laws. The Liberal Party Tasmanian government emphasised the discretion of a State to make judgements about matters of public welfare and the inability of the State

4 *Toonen v Australia*, Comm No 488/1992, UN Doc CCPR/C/50/D/488/1992, 4 April 1994.

to change personal opinions. When the adverse Human Rights Committee view was handed down, the Commonwealth government acted speedily to enact the *Human Rights (Sexual Conduct) Act 1994*. Looking at the case in the context of Australia's past history, the Labor Commonwealth government's approach of accepting international scrutiny, accepting limits to governmental power, and enacting federal legislation mirrored approaches during the Evatt period. The approach of the Tasmanian government was closer to that of Spender and Whitlam's philosophical approach to defending State discretion in matters of defending rights. It will also be recalled that all the provisions with 'arbitrary' protections were the subject of resistance by Whitlam and his successors on the basis that they did not sufficiently define the restrictions on governmental power. The *Toonen* case thus serves as an excellent example of the residual divergences in approaches of different State actors.

The second case in which the Human Rights Committee reached the conclusion that Australia was breaching its obligations concerned federal law that permitted the ongoing detention of illegal entrants to Australia. In *A*'s case,[5] the Human Rights Committee concluded, *inter alia*, that the detention of individuals on the basis of a general deterrence policy rather than evidence as to the individuals' likelihood to abscond was 'arbitrary'. The legislative policy had been introduced by a Labor government. The Liberal Party was in power when the Human Rights Committee view was expressed. The Australian government disputed the findings of the Committee as to the meaning of 'arbitrary' and 'unlawful' and affirmed the legitimacy of their migration policies. Such a reaction is consistent with the deeply seated, bipartisan resistance to permit international human rights guarantees to interfere with immigration policies revealed in this thesis.

Thirdly, in 1998 Australia's Aboriginal policies were questioned by the Committee on the Elimination of all forms of Racial Discrimination (the CERD Committee). The CERD Committee sought information from the federal government concerning, *inter*

5 *A v Australia*, Comm No 560/1993, UN Doc CCPR/C/59/D/560/1993; 30 April 1997.

alia, changes to the *Native Title Act 1993* which were allegedly racially discriminatory.[6] The amendments had the effect of reducing native title rights enjoyed over pastoral lease properties.[7] After considering information provided to it by the government and non-government organisations, the CERD Committee expressed 'concern' at the inconsistency between the amendments (and the lack of consultation involved in the promulgation of these amendments) and Australia's obligations under CERD.[8] Viewed in the context of the findings of this thesis, the resistance of the Australian government to adopting a 'substantial equality' approach to indigenous Australians and its neglect of distinct Aboriginal rights seems to be part of an ongoing pattern of marginalising consideration of non-Anglo-Celtic persons and interests in determining Australia's international human rights policy. However, this thesis suggests that, despite the political heat of the debates surrounding the amendments to the *Native Title Act 1993*,[9] it is not clear that had the Labor Party been in power, one would have seen more fulsome consideration of Aboriginal interests.

Most recently, in August 1999 the Minister for Foreign Affairs, the Attorney-General and the Minister for Immigration and Multicultural Affairs issued a joint press release criticising the current operation of the United Nations human rights treaty bodies.[10] The release argued *inter alia* that the system of committees under the human rights treaties needed reform in order to ensure 'adequate recognition of democratically elected governments and the subordinate role of non-government organisations' and to ensure committees worked within their mandates. As a statement, it was strongly reminiscent of Australia's arguments during the 1950s and 1960s that the United Nations was

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6 The CERD Committee was acting pursuant to its 'early warning' processes: Decision 1(53), UN Doc A/53/18, para 22; 11 August 1998.

7 The survival of native title on Crown land over which pastoral leases had been granted was affirmed in the *Wik* decision of the High Court: Wik Peoples v Queensland (1996) 187 CLR 1; Casenote prepared by author, 'Co-existence of native title and pastoral leases', (1997) 22 *Alternative Law Journal* 47.

8 Decision 2(54), UN doc A/54/18, para 21(2); 18 March 1999.

9 For a history of what is termed the 'Wik' debate, see F Brennan, *The Wik Debate: its impact on aborigines, pastoralists and miners*, University of New South Wales Press, Sydney, 1998.

10 Joint News Release of the Minister for Foreign Affairs, the Attorney-General and the Minister for Immigration and Multicultural Affairs, 29 August 2000: 'Improving the Effectiveness of United Nations Committees'. The full text can be found on the Attorney-General's website: http://www.ag.gov.au/aghome/agnews/2000newsag/joint14_00.htm

trespassing on the powers of States and was being vulnerable to being manipulated by subversive elements. Although stripped of any Cold War overtones, the response demonstrated a belief that United Nations committees' primary role was to listen to and assist governments. Non-government organisations were to enjoy a secondary status whilst individuals were not mentioned as a stakeholder in the deliberations of committees. Rather than being an isolated over-reaction to adverse criticism from the treaty-bodies, this thesis has shown that the resistance to recognising the legitimacy of United Nations adjudication of human rights disputes has a long heritage.

Further examples of parallels between Australia's 'pre-ratification' and 'post-ratification' international human rights history can also be drawn from recent domestic policies. Whereas a Labor government established the Human Rights and Equal Opportunity Commission,[11] a Liberal administration is seeking to rename the Commission, the Human Rights and Responsibilities Commission.[12] It is a movement echoing the earlier divisions between Evatt and Spender as to the inter-relationship between rights and duties. Similarly, in a manner reminiscent of Spender's emphasis on correlative duties, the Howard Liberal administration has stressed the concept of 'mutual obligations' and introduced work requirements for receipt of government unemployment benefits, a move resisted by Labor party representatives.[13] These examples reflect ongoing ongoing divergences within Australia as to the meaning of human rights guarantees and justify looking further at additional patterns that might be replicated.

The dynamism of Australia's 'pre-ratification' international human rights policy suggests that it is not possible to take for granted all future State actors acceptance of a universal 'objective' interpretation of international human rights standards. While

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11 HREOC was established by the *Human Rights and Equal Opportunity Act 1986 (Cth)*

12 This change was embodied in the Human Rights Legislation Amendment Bill (No 2) 1998. It has not yet been passed by both Houses of Parliament.

13 The scheme which is colloquially known as the 'Work for the Dole Scheme' was embodied in the *Social Security Legislation Amendment (Work for the Dole) Act 1997*. For a critical examination of its effect, see M Leech, *Work for the Dole – Does it Work?*, Uniya Focus Series, Sydney, 1997

future governments could be expected to uphold the value of international human rights, it is likely that their understanding of the implications of such rights will vary considerably. Although the Australian Labor Party appears to have moved away from any active commitment to socialising industry, the Labor Party retains a commitment to government intervention in the economy and a suspicion of relying purely on free enterprise for the fulfilment of individuals' rights. The Liberal Party, by way of contrast, retains an individualist small government outlook that sees large-scale welfare policies as harmful and encourages individuals to be the agents of social change. Liberal State actors would be less likely to regard intervention in the private economic sector as a necessary step to fulfil international obligations than would Labor State actors. These philosophical differences are prime candidates for shaping future Australian human rights policy. Specifically, future Labor State actors are more likely to adopt broad interpretations of rights in the ICESCR than their Liberal Party counterparts. Likewise, it could be anticipated that Labor administrations are likely to take a more expansive interpretation of a State's obligation to enact implementing legislation than Liberal administrations which would stress the importance of public education.

In periods (or in relation to specific subjects) in which bureaucrats are dominant, one could also predict that a State-centric perspective is likely to be adopted. Such a perspective would correspond with general defences of existing policy, and the adoption of expansive interpretations of limitations clauses in the instruments. In the absence of strong political intervention, it could also be expected that Australia would respond selectively to requests for information from international bodies and view criticism by international bodies as unwarranted and unjustified.

Variations are also likely in future conceptualisations of the ideal relationship between the individual, the State and the international community. Notwithstanding the establishment of mechanisms of international implementation in the ICCPR and the ICESCR and Australia's ratification of the Optional Protocol to the ICCPR,

receptiveness to international criticism may well vary. The thesis has revealed a strong State-centric, nationalist perspective in both Liberal and bureaucratic periods of administration. Conversely, it has highlighted Evatt's adherence to a more internationalist perspective in which the State is the conduit of communication between the individual and the international community. Looking towards the future, this thesis would suggest that conservative politicians and bureaucratic decision-makers, in particular, are likely to adopt a narrow view of the relationship between the international community, the State and the individual and so translate a resistance to international 'interference' in domestic human rights affairs into a narrow interpretation of the powers of international human rights bodies. Clearly, debate on such general philosophical points is likely to continue to underlie debates concerning the role of the international community in the implementation of human rights.

If a true dialogue is to be conducted in Australia, it is vital that speakers appreciate the depth of pre-existing philosophic differences between actors. For those interested in improving Australia's compliance with human rights standards interpreted according to the 'human rights lexicon' shared by many commentators, little will be gained by simply repeating the terms of the international instruments. Interpretation of these instruments is likely to remain a battlefield. The task of human rights commentators and activists is to justify, rather than simply assert, the superiority of the values informing the observer's interpretation and criticisms. There may, of course, be cases where a government is acting contrary to its own appreciation of its obligations. Yet there may also be a wide range of cases in which governments are acting in accordance with their *bona fide* interpretation of their obligations. Dialogue must thus include reference to the underlying values and perspectives informing policy rather than focusing exclusively on 'shaming tactics', that is accusing governments of a lack of commitment to (universally understood) human rights principles.

It would also seem likely that the persistent areas of resistance noted in this thesis will feature in future disputes involving Australia. Self-determination, in particular

economic self-determination, would be an obvious candidate for further contention[14] as would special rights for minorities. Similarly one would expect there to be an entrenched resistance to ensuring substantive equality of any form, but particularly with respect to the substantively equal treatment of men and women in the workplace. The implementation of economic and social rights would also seem likely to attract secondary consideration with bipartisan resistance to any adjudicatory or judicial consideration of Australia's compliance with economic and social rights standards. One might also expect replication of the implicit dichotomy between those considered worthy of human rights and those requiring 'special protection' *from* human rights. Although seen in this thesis in the context of Aboriginal people, it is possible that the dichotomy might be used to justify the State's limitation of rights to other groups considered 'vulnerable' such as persons with intellectual disabilities.

Other less obvious implications of Australia's negotiating history can be identified. From a process point of view, one would expect that Australian government authorities would be resistant to the notion of evolving understandings of human rights, notwithstanding the provisions of the *Vienna Convention on the Law of Treaties*. Throughout the negotiations, federal government departments and state departments were given feedback on the 'meaning' of clauses. Often, they were reassured that their policies did not infringe the relevant standards or at least that Australia would insulate existing policies through making an appropriate statement of understanding. In none of the advices provided was there any reference to the possibility of the meaning of the clauses changing over time. Thus, a culture may well have been created of departments and states accepting that international human rights had a fixed meaning. One could expect significant opposition to be expressed towards arguments by international bodies or commentators that the meaning of clauses had evolved. In particular, if a Department were advised in say, 1964, that a policy was consistent with the international standards, one could expect little receptiveness from that Department to

[14] Chapter 3 has already noted the way in which Australian delegates involved in discussions of the Draft Declaration on the Rights of Indigenous Peoples have recently sought to distance Australia from support for indigenous persons' right to self-determination: see Chapter 3, fn 52.

any argument that by the development of international law, these policies had become unacceptable. In the case of the Department of Immigration, the consistent efforts to insulate immigration policy from the scope of international human rights might in particular be expected to give rise to a dominant cultural belief that human rights were an improper influence, an unjustified interference on ongoing policy development.

International pressure has been revealed as a likely catalyst for changes of policy, though this policy has underlined the extent to which such changes may be superficial. In the instance of Australian attitudes towards scrutiny of apartheid, for instance, the Australian State accepted the condemnation of apartheid in the General Assembly whilst resisting similar scrutiny of Australian indigenous policies. Similarly even though the international politicisation of race caused Australia to reverse its opposition to Article 26 of the ICCPR's inclusion of protection of 'equal protection', Australian delegates did not thereby surrender a narrow view of 'equal protection'. Thus for advocates seeking international condemnation of policies, care is needed to ensure that the international scrutiny is sufficiently specific to minimise the chances of the Australian State employing 'distinguishing tactics' to avoid the real impact of the criticism. Similarly, the ongoing monitoring of a State's behaviour post-criticism is vital in order to ensure that 'prohibited action' does not reappear in another guise.

More encouraging signs may also be identified from this research. This thesis has highlighted the role of individuals in shaping policies, or more specifically, the role of individuals' personal and party-political philosophies. For those wishing to change dominant conceptions of human rights, the task of encouraging individuals to alter their outlook may appear less daunting than changing the patterns of the more amorphous 'State'. Recognising the diversity of opinions within a State permits strategic interventions to change the overall behaviour of the State. The lobbying of political parties and their members would also appear to be a fruitful means of attempting to change both influential individuals' attitudes and the party-political principles that offer resistance to active government realization of human rights. Attention could also be

focused on broadening the pool of individuals likely to play a role in decision-making at either the political or bureaucratic level. It is noticeable, for instance, that all the key personnel involved in the development of Australia's human rights policy were Anglo-Celtic men.[15] A more representative sample of personnel to be involved in key positions would be likely to lead to the adoption of broader perspectives on the meaning and implementation of human rights.

Furthermore, in the Australian context, this thesis has highlighted that federalism has not been used consistently as a barrier to the federal legislation implementing human rights. This thesis has revealed that stress on a federal-State clause came from the Commonwealth rather than the Australian states. Support for a federal-State clause was not continuous throughout the negotiations but peaked as a result of Kenneth Bailey's cautious view of federal legislative authority and his view, probably shared by Spender and his Liberal party successors, that the states were better placed to implement human rights guarantees. Although by 1955, states had become more active in supporting inclusion of a federal-State clause, the Commonwealth ultimately was prepared to surrender its push for a federal-state clause. The way in which Evatt supported federal action offers the prospect that not all future governments will view federalism as an implacable barrier to federal legislative action.[16] By outlining the extent to which Australian states were kept informed of the developing Covenants, this thesis also undermines the states' claim that obligations were thrust upon them without their knowledge.

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15 Although by the 1960s, the Australian delegation to the Third Committee of the General Assembly included Elizabeth Warren, Ms Decolgnon (nee Warren) has reported that she had no role in formulating policy. Instead, she directly repeated instructions in the Brief sent to her: Interview with Ms Delognon by author, 9 September 1999, Canberra.

16 As to the way in which federalism has been used as a justification to desist from legislative action, see H Charlesworth, who has concluded that 'federalism' 'has become a weasel word, allowing Australia to rationalise its tardy participation and ambivalent implementation of human rights guarantees': 'The Australian Reluctance About Rights' in P Alston (ed), *Towards an Australian Bill of Rights*, Human Rights and Equal Opportunity and Centre for International and Public Law, ANU, joint publication, Canberra, 1994, 44.

In identifying the ever-changing parade of faces, personalities and philosophies in Australia, this thesis' findings are significant for other States. Through its use of the central concept of the 'State', international law gives the misleading impression of an unchanging entity exercising sovereignty over its people. The reality is far more complex. By going behind the Statist veil, this thesis has revealed that the potential influences shaping State human rights policy are ever-changing. Even if a State at the time of ratifying the human rights treaties accepted a particular understanding of human rights obligations, there is no guarantee that later States, composed of different persons and philosophies, will have the same approach to those obligations. It cannot be expected that even a State that helped draft a particular Covenant will retain the opinions or even knowledge relating to the instrument in some twenty years. Thus, a process of continuous promotion of human rights and the meaning of the human rights needs to be maintained within and outside States for their effective implementation.

Within Australia, this thesis points to the value of further research on Australia's 'pre-ratification history'. Future studies might profitably examine the extent to which there was an unbroken chain of thinking between 1966 and Australia's ratification of the ICCPR and ICESCR. With the increased activism in civil society during the Vietnam years, one might find new evidence of the influence of domestic pressures on Australian policy. Inevitably, more information would be available on the perceptions of the impact of the ICCPR and ICESCR on domestic policies of the Commonwealth and the states that might serve to enrich further our understanding of the way in which domestic implementation policies were conceived. It would also permit further examination of the extent of divergences between perceptions of Liberal and Labor administrations. For too long Australia's 'pre-ratification' history has been treated as irrelevant to Australia's current practices. It is only by reclaiming individual States' histories and revealing prior understandings of human rights that we will appreciate more fully the complexity of decisions being made concerning the implementation of international human rights guarantees.

Appendix 1- Timeline

YEAR	INTERNATIONAL HUMAN RIGHTS EVENT	AUSTRALIAN MINISTER FOR EXTERNAL AFFAIRS
1945	Adoption of the United Nations Charter	Dr HV Evatt (from 7 October 1941)
1946	Economic and Social Council's Creation of the Commission on Human Rights	
1947	First Meeting of the Commission on Human Rights; Decision taken to draft a Declaration and a Covenant on Human Rights	
1948	Universal Declaration of Human Rights adopted by the General Assembly	
1949		PC Spender (from 19 December 1949)
1951		RG Casey (from 27 April 1951)
1954	Commission on Human Rights ended its deliberations on the two human rights Covenants; submitted draft texts to the General Assembly	
1955	Third Committee of the General Assembly began its consideration of the draft Covenants	
1960		RG Menzies (from 4 February 1960)
1961		G Barwick (from 22 December 1961)
1964		P Hasluck (from 24 April 1964)
1966	General Assembly adopts the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (ICESCR)	

Appendix 2 – The International Bill of Rights

A. Universal Declaration of Human Rights

Adopted by the General Assembly resolution 217 A (III), 10 December 1948

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, therefore,

The General Assembly,

Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2.This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

1. Everyone has the right to a nationality.

2.No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2.No one may be compelled to belong to an association.

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2.Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

B. International Covenant on Economic, Social and Cultural Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 3 January 1976, in accordance with article 27**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 26;

(b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

C. International Covenant on Civil and Political Rights

Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

***entry into force* 23 March 1976, in accordance with Article 49**

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3.

(a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to

appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of

juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall

not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1 . The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which

has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information. 7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes. 3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

SOURCE: United Nations High Commissioner for Human Rights Website: http//www.unhchr.org

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